Supreme Court, U.S.
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No. 06-061127

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IN THE

Supreme Court of the United States

MEDIA SIX, INC. AND CHARLES ROARK,
Petitioners,

v.

JOAN ZIGLAR,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Virginia erred in affirming, contrary to the First Amendment jurisprudence of this Court, that a letter to the editor must be thoroughly investigated to determine whether the statements are true else the newspaper will be found to possess constitutional actual malice and a high degree of awareness of probably falsity when it prints the letter.

PARTIES TO THE PROCEEDING

The case caption contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT

There are no parents or subsidiaries of Media Six, Inc.

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OPINIONS BELOW

On February 18, 2003, in a letter opinion, the Circuit Court for the City of Roanoke overruled the Demurrers filed by Defendants. This opinion is reprinted in the Appendix to the Petition ("App.") at 17a-28a. On January 4, 2006, Defendants filed a Motion for Judgment Notwithstanding Jury Verdict Due to Insufficient Evidence and Error by the Trial Court. App. 46a-49a. On March 27, 2006, the Circuit Court entered Judgment against the Defendants in accordance with the jury's verdict. App. 50a-53a. On September 8, 2006, the Supreme Court of Virginia refused the Petition for Appeal. App. 54a. On November 17, 2006, a Petition for Rehearing was denied. App. 55a.

JURISDICTION

The Supreme Court of Virginia entered its judgment on September 8, 2006, and the Petition for Rehearing was denied on November 17, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, 1 amend. (1791)

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, 14 amend., § 1 (1868)

STATEMENT OF THE CASE

This case raises an important First Amendment issue involving the ability of newspapers to print letters to the editor making serious charges of impropriety against public officials without investigating to verify the truth of the charges. The ruling is contrary to this Court's rulings in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, because it equated a failure to verify with a knowledge of falsity and substituted a reasonable belief standard for

the required standard of proof of actual malice by clear and convincing evidence.

There is a striking similarity between this case and *New York Times Co. v. Sullivan* where a newspaper printed an advertisement making extraordinarily serious charges against official police conduct in Alabama. The newspaper did not investigate such charges. In fact, upon examination, the newspaper conceded there was within its own files, information which would have demonstrated the falsity of certain of the accusations. Nonetheless, this Court held that the First Amendment prevented the newspaper from being liable without a showing by clear and convincing evidence that the newspaper had either serious doubts as to the truth or a high degree of awareness of probable falsity.

The courts below found that because the charges were made by a convict and because a charge of impropriety by a public official is surprising, this alone created clear and convincing evidence that the newspaper and its managing producer possessed constitutional actual malice sufficient to sustain a jury verdict. The lower courts made this ruling even though the public official had a policy of not commenting, the newspaper would not have access to the letter writer, and the charge involved a plea agreement between the Commonwealth's Attorney and an admitted murderer. The only people who would know the truth would be the Commonwealth's Attorney, the murderer, and the letter writer, and they would be expected to have opposing viewpoints.

Plea bargains are a normal, necessary, but highly suspect part of the criminal justice system. They are routinely attacked, regularly criticized, often abused, and yet they are on many occasions the sole basis for guilty verdicts. By using the felon, the prosecutor is vouching for the felon's credibility.

What this case stands for is that while prosecutors all rely on felons to obtain convictions, a newspaper cannot allow the person accused as a result of a plea agreement to articulate his criticism in a letter to the editor without first investigating and determining the truth of the charges in a situation where the truth may be unknowable. Because the prosecutor relies upon criminals to convict others, the prosecutor's position is that criminals are reliable only when talking about others accused of crimes but not when making statements about prosecutors, a position raising the gravest constitutional questions.

Whether and to what extent plea agreements are improperly entered is a matter of enormous importance, but unknown. The criminal defense bar claims these agreements are regularly misused. Prosecutors claim they are always appropriate. This is an issue on which there should be an opportunity for the public to have the benefit of alternative viewpoints.

This case is important. Every charge against a public official is surprising. Happily, official misconduct is not so routine as to be unsurprising. No one would have anticipated that a President of the United States would authorize a third-rate burglary or that a President of the United States would engage in improper sexual relations and deny that involvement in a nationally televised broadcast. And while everyone would agree that a felon is not the most reliable of sources, where the felon is the only one in a position to know and provides a compelling and detailed recitation of facts alleging official impropriety, a newspaper should not be held to violate the First Amendment when it prints the letter indicating the source. Not knowing whether a letter is true is different from having serious doubts as to the truth, and this difference is of enormous First Amendment significance.

Review is urgently needed because this case is being trumpeted by public officials as standing for the proposition that a newspaper may not comment or print any factual

commentary concerning official performance without first investigating and determining the truth of the allegations. This opinion ignores the fact that the majority of charges against public officials are unverifiable by any investigation. Until the DNA sample on the famous blue dress was analyzed, no one could know whether a president of the United States had engaged in improper sexual activity. Until Judge Sirica's aggressive and persistent activity in the trial of the Watergate burglars, there was no way to verify whether the president was involved in or had advance knowledge of the burglary. These graphic examples are not unusual.

Furthermore, the vast majority of charges made against public officials are made by those with a lesser credibility than the public official. "[N]ewspaper investigation of reports of corruption must often obtain first-hand corroboration from those present in the barrooms or gambling houses, rather than from citizens who spend their time only at home, in church, or at work in less colorful occupations." *Kidder v. Anderson*, 354 So.2d 1306, 1309 (La. 1978). One would not expect Monica Lewinsky would be more credible than the President of the United States. The notion that surprising charges about official misconduct from less credible witnesses cannot be published without investigation opens the door to a censorship heretofore unknown in our jurisprudence and completely contrary to First Amendment values. For smaller newspapers such as the one involved here, it is a judicial admonition to stop printing any accusations of impropriety unless they can be verified, without regard to whether verification is possible. While this case involves a small newspaper in a small town, the First Amendment issues here are anything but small and require this Court's intervention.

The First Amendment protections involved in this case are so important not because the press does its job so well. Far from it. These protections are necessary because even with the protection of the First Amendment, history teaches that

the press has been adequate to the task. The federal Freedom of Information Act has revealed that government programs involving involuntary drug testing, exposure of soldiers to nuclear radiation, sterilization, etc., took place in absolute secrecy. The media was silent about the dangers in Viet Nam and the potential dangers in Iraq until after the fact. In light of this track record, the notion that we need more censorship is unsupportable.

"The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

The guarantees of the First Amendment "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assure the maintenance of our political system and an open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); David A. Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422 (1975).

FACTUAL BACKGROUND

Media Six, Inc. ("Media Six") was the publisher of the *Buzz*, a newspaper circulated in Martinsville, Virginia, and its environs. Charles Roark is the president of Media Six and was the managing producer of the *Buzz*. The *Buzz* published certain of the letters to the editor it received. The letters are always attributed to the writer. Letters are published based upon the importance of the topic addressed and the seriousness of the issue. The selection process reflects a commitment to allow the presentation of diverse and antagonistic viewpoints.

On or about November 1, 2001, Za'Kee P.J. Tahlib, an incarcerated convict, wrote a letter (Pet. App. 10a-12a) making a charge against Joan Ziglar, the elected Commonwealth's Attorney for the City of Martinsville ("the prosecutor"). Mr. Tahlib's letter said that he was a convict and identified the charges on which he was being prosecuted by Ms. Ziglar. Mr. Tahlib said that the case against him was based on the testimony of his former bodyguard, Ramzee Shareef, who had pled guilty to capital murder.

The letter charged that Mr. Shareef's testimony was perjured and that the perjured testimony was being used by Ms. Ziglar because of a desire for revenge relating to an affair between Mr. Tahlib and Ms. Ziglar's sister. The letter ended with the statement, "I am willing to take a polygraph test to confirm the statements I have made. And I challenge J. Ziglar to take one as well."

The *Buzz* was aware of the prosecutor's policy of making no comments concerning pending cases and was aware that the Martinsville jail would not allow reporters to have access to convicts. The newspaper expected that the prosecutor would deny the charges, even if true.

There was no apparent motive for Mr. Tahlib to deliberately lie prior to his criminal trial. Convicts are aware that sentencing judges punish those who deliberately lie about their crimes. Mr. Tahlib was accused of serious charges, and he was in a position to know the facts. His willingness to make the charges against the prosecutor suggested that the public had a right to hear his side. The *Buzz* identified the source of the letter, which recited the circumstances of its being written. The headline above the letter read, "Convict Speaks Out Against Joan Ziglar."

The *Buzz* did not investigate the charges made by Mr. Tahlib. The only people who would know whether the testimony against Mr. Tahlib was perjured were the prosecut-

ing attorney and Mr. Shareef, both of whom would be expected to issue denials. The prosecuting attorney had a policy of not commenting on cases, and the jail did not provide media access to convicts. It was hardly expected that the prosecutor's sister would admit an affair. The use of the testimony of an admitted murderer to convict another person accused of a crime raise serious questions. The specificity of these charges strongly suggested strongly the need for public commentary.

PROCEEDINGS BELOW

On February 13, 2002, Ms. Ziglar filed a Motion for Judgment in the Circuit Court for the City of Roanoke against Media Six, Charles Roark (the managing producer of the *Buzz*), Earl W. Wallace, Jr. (*Buzz* editor), and Za'Kee P.J. Tahlib seeking $2 million in compensatory and $1 million in punitive damages. App. 1a-12a.

On March 12, 2002, Defendants Media Six, Roark and Wallace filed Demurrers which immediately raised the constitutional issue that is the basis for this petition. App. 13a-16a. The Demurrers stated, "Publishing a letter without verifying the said facts concerning a public official does not provide a basis for a defamation action. *St. Amant v. Thompson*, 390 U.S. 727 (1968)."

The Demurrers were overruled in a letter opinion dated February 18, 2003 (App. 17a-28a), which was incorporated into an Order on that same date. App. 29a-30a. Grounds of Defense were filed on February 20, 2003. App. 31a-45a. The first affirmative defense was, "The First Amendment to the United States Constitution and the progeny of the United States Supreme Court cases interpreting the same."

The case was tried on December 12-14, 2005. Defendants reiterated First Amendment objections. During the trial, the trial court admitted the testimony of an alleged expert on

journalistic practices who stated that the letter should have been investigated prior to being published.

The jury entered a verdict in the amount of $75,000. Defendants preserved First Amendment objections. Defendants moved for judgment notwithstanding the verdict and reiterated in that motion and in the argument First Amendment objections. App. 46a-49a. This motion was overruled by Order entered March 27, 2006. App. 50a-53a.

On June 23, 2006, defendants filed a petition for appeal with the Supreme Court of Virginia reiterating First Amendment objections to the verdict. On September 8, 2006, the Supreme Court of Virginia refused the petition to appeal. App. 54a. On September 22, 2006, defendants' petitioned for a rehearing. By order entered November 17, 2006, the petition for rehearing was denied by the Supreme Court of Virginia. App. 55a. At every stage of the proceedings, the First Amendment issues were raised and the objection preserved.

REASONS FOR GRANTING THE PETITION

This Court does not review cases simply because they are decided wrongly. A case does not merit review unless the case establishes a principle that implicates constitutional values. The decision in this case establishes a principle that is contrary to the heart of this Court's First Amendment jurisprudence as set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and numerous other cases. This decision, if correct, requires publishers to censor letters to the editor concerning official misconduct to such an extent as to significantly reduce the ability to publish information vital to the functioning of this country's democratic institutions.

This case is enormously important because it purports to establish the principle that a newspaper may not print a letter to an editor criticizing a public official on a matter of important public concern unless it is in a position to certify the

bona fides of the letter-writer or undertake an independent investigation to determine the facts. The opinion purports to establish the proposition that anyone convicted of a crime is unreliable and must be censored without independent investigation. The case purports to establish that an individual convicted of a crime making serious charges is so inherently incredible that the newspaper cannot believe what is said but simultaneously establishes a principle that a jury is entitled to award damages even though no damage could possibly occur unless readers believed the letter. The case establishes the proposition that a newspaper may not believe a letter without investigation but a jury verdict may be based upon the fact that readers are presumed to believe the letter even though the readers have the same information as the newspaper. These extraordinary principles are contrary to this Court's First Amendment jurisprudence.

The prosecutor in this case argues that reliance on the statements of an accused convict is inherently unreliable while at the same time offering the testimony of a person who had pled guilty to capital murder for the purpose of convicting another. In order for the prosecutor to offer this testimony, she had to believe it was true. In order for the newspaper to publish the letter, it only had to be in the position of not being aware that the letter was false. It is passing strange for a prosecutor to claim that she has the right to rely upon, and regularly does rely upon, the testimony of convicted felons, but that a newspaper that does not immediately assume such felons are lying is guilty of constitutional actual malice.

The function of letters to the editor is to present commentary and criticism from members of the public and to allow viewpoints and ideas that differ from those expressed in the newspaper. These letters are like a public forum. "[S]trongly worded letters to the editor" are important parts of "that robust and uninhibited commentary on public issues that is a

part of our national heritage." *Kotlikoff v. Community News*, 444 A.2d 1086, 1092 (N.J. 1982). "[If an] assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech is entitled to constitutional protection because it is made in the employee's capacity as a private citizen and touches on matters of public concern." *Urofsky v. Gilmore*, 216 F.3 401, 409 (4th Cir. 2000) (*en banc*). This case stands for the proposition that an assistant district attorney's letter can be printed, but a convict's letter must be censored unless the newspaper is in a position to investigate and determine that it is true. It is not an accident that letters to the editor are generally placed on the "op-ed" page, the page opposite the newspaper's editorial page. Letters regularly assert positions opposed by the newspaper and contrary to the prevailing beliefs of a majority of the newspaper's readers.

Our history is replete with examples of a single, unpopular, lonely and unrespected voice crying out a truth which is established only by time. A holding that the unpopular and discredited may not be published without investigation, even where their opinions and statements are attributed to them, breaks with this country's First Amendment tradition.

The prosecutor cannot deny that the letter writer was one of only three individuals to be in a position to know whether what he said was true. The prosecutor cannot deny that any convict awaiting trial would have been aware that publishing deliberate falsehoods in a newspaper could seriously adversely affect his sentencing and possibly affect the course of his trial. A letter to the editor is a serious document. It requires time to write and to compose. It is hard to see why anyone, including a convict, would write a letter to the editor to make false charges and ask that the letter be published if the falsity of the charges could be established easily and if his sentence could be adversely affected. Judges punish those

who lie and refuse to accept responsibility for criminal actions.

A. The Fact That The Letter May Have Contained Falsehoods Does Not Establish That There Was An Awareness Of Falsity

While this Court has recognized that there is no value in a false statement of fact, such statements are inevitable in free debate. The jury found that Mr. Tahlib's letter was false, but in dealing with serious charges about a public official's conduct, a journalist is not required to obtain absolute certainty, or else there would be no criticism of government. As this Court observed in *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968): "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." This Court has noted, "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989).

Justice Holmes observed, "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion).

If the standard is that the newspaper must verify that a charge is true before it can publish a charge of impropriety against a public official, the level of censorship imposed by this standard will be enormous. The marketplace of ideas will eventually illuminate the charges and hopefully establish truth or falsity. But this case establishes the rule that charges

of impropriety made by a person in a position to know may never be placed into the marketplace for consideration unless they are the type that are subject to verification. Most such charges are not subject to verification by reporters who cannot compel testimony or subpoena records.

B. A Failure To Investigate Extraordinary Charges Is Not Actual Malice

The Court has dealt with extraordinary charges against public officials when the charges were so extraordinary that they might not be supported by a reasonable belief. *Garrison v. Louisiana*, 379 U.S. 64 (1964), involved a district attorney who charged eight judges with everything from inefficiency and laziness to racketeer influence. This Court observed that the lower courts found that the district attorney might not have had a reasonable belief as to the truth of those statements but nonetheless said, "[T]he reasonable belief standard . . . is not the same as the reckless-disregard-of-truth standard." *Id.* at 79. In *Garrison* this Court described the reckless disregard standard as follows:

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs in concerned. And since "erroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they 'need . . . to survive' *only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.*"

Id. at 74 (citation omitted) (emphasis added).

St. Amant v. Thompson, 390 U.S. 727 (1968), involved a suit against a political candidate who had made a false charge of bribery against a deputy sheriff. The candidate had no personal knowledge of the deputy sheriff's activities, relied solely upon a union member's statement although there was

no record evidence of the union member's reputation for veracity, failed to verify the information with those in the union office who might have known the facts, gave no consideration to whether the statements defamed the sheriff, and went ahead heedless of the consequences. The charge that a deputy sheriff took a bribe is at least as extraordinary as a charge that a prosecutor utilized erroneous testimony. The candidate did not take the slightest step to investigate. Yet this Court ruled that a recovery was impermissible. The standard adopted was:

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.*

Id. at 731 (emphasis added).

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967), involved an allegation that a court clerk had threatened other officials. The newspaper's president and general manager admitted that no specific investigation was made before the editorials were written and that the only basis for the quoted statement was the editorial writer's cause to feel there was a possibility that the court clerk had threatened other officials. Even though there was no investigation and the article was written on the basis of a possibility, the judgment was reversed. The reversal occurred without oral argument despite the failure of the defendant's attorney to properly raise constitutional issues at trial and in spite of the fact that defendant's attorney requested improper instructions. *Beckley* involved a gross departure from prudence and good judgment, but this gross departure did not mandate liability nor should it have.

C. The Introduction Of Expert Testimony Concerning A Duty To Investigate Is Directly Contrary To This Court's Jurisprudence

The admission of expert testimony on journalistic standards highlights the fact that this case was tried on the basis of an unconstitutional standard. Plaintiff was allowed to present Dr. Ed Wasserman, who was qualified as an alleged expert on the editorial process. Mr. Wasserman testified that the verbatim publication of the letter was a violation of the editorial process. Dr. Wasserman further testified that prior to publication, there was a need for careful investigation and if the matter could not be proved true, then the letter could never be published.

Dr. Wasserman was allowed to testify about negligence even though the issue in this case should have been the existence of actual malice. Actual malice is a subjective standard, and negligence does not establish actual malice.[1]

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[1] In *New York Times Co. v. Sullivan*, 376 U.S. 254, 287-88 (1964), this Court said:

> We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

Many lower courts have followed this Court's direction that negligence is not sufficient to establish actual malice. *Newton v. National Broad. Co.*, 930 F.2d 662 (9th Cir. 1990) (rejecting "should have been foreseen" as standard for "actual malice"); *Pauling v. Globe-Democrat Publ'g Co.*, 362 F.2d 188 (8th Cir. 1966); *Arizona Biochemical Co. v. Hearst Corp.*, 302 F. Supp. 412, 418 (S.D.N.Y. 1969); *Rose v. Koch*, 154 N.W.2d 409, 430 (Minn. 1967); *Glover v. Herald Co.*, 549 S.W.2d 858 (Mo. 1977); *Mahoney v. Adirondack Publ'g Co.*, 517 N.E.2d 1365 (N.Y. 1987); *DiLorenzo v. New York News Inc.*, 4 Media L. Rep. (BNA) 2230 (N.Y. Sup. Ct. 1979); *Dupler v. Mansfield Journal Co.*, 413 N.E.2d 1187 (Ohio 1980); *West v. New York Daily News*, 5 Media L. Rep. (BNA) 1269 (N.Y. Sup. Ct. 1980). *See also Woodcock v. Journal Publ'g Co.*, 646 A.2d

This Court has made it plain that the failure to investigate is not actual malice. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971), this Court said, "For the reasons we have stated, the negligence standard gives insufficient breathing space to First Amendment values." In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974), this Court discussed the unique nature of actual malice:

> As so defined [in the *New York Times*], of course, "actual malice" is a term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers. As such, it is quite different from the common-law standard of "malice" generally required under state tort law to support an award of punitive damages.

In *Herbert v. Lando*, 441 U.S. 153, 199 (1979), Justice Stewart observed:

> Although I joined the Court's opinion in *New York Times*, I have come greatly to regret the use in that opinion of the phrase "actual malice." For the fact of the matter is that "malice" as used in the *New York Times* opinion simply does not means malice as the word is commonly understood. In common understanding, malice means ill-will or hostility, and the most relevant question in determining whether a person's action was motivated by actual malice is to ask "why." As part of the constitutional standard enunciated in the *New York Times* case, however, "actual malice" has nothing to do with hostility or ill will, and the question "why" is totally irrelevant.

(Conn. 1994) (not "actual malice" for headline writer mistakenly but not purposely to misinterpret article).

The distinction between constitutional actual malice and malice was accurately highlighted by a lower court in *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1349-50 (S.D.N.Y. 1977):

> Although these definitions distort common English, they must be taken at face value. In the context of a libel suit "actual malice" simply does not mean ill-will or spite. Rather, "malice" must be taken to mean fraudulent, knowing, publication of a falsehood, or reckless disregard of falsity. And we also note that reckless does not mean grossly negligent, its common use, but rather *intentional disregard.* When the Supreme Court uses a word, it means what the Court wants it to mean. "Actual malice" is now a term of art having nothing to do with actual malice.

In *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), the Court noted, "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication." In *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), this Court stated, "[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." Under these standards, Dr. Wasserman's testimony was not admissible.

"[E]xpert opinion testimony generally is not helpful when determining actual malice against a subjective standard." *Harris v. Quadracci*, 856 F. Supp. 513, 519 (E.D. Wis. 1994), *aff'd*, 48 F.3d 247 (7th Cir. 1995). In *Gonzales v. Hearst Corp.*, 930 S.W.2d 275, 283 (Tex. Ct. App. 1996), the court observed, "[T]his testimony is objective in nature and does not assist the trier of fact in determining the *subjective* truth of whether [the defendants] entertained serious doubts as to the accuracy" of the publication. In the cases from this Court cited earlier, it was clear that many of the speakers could have and indeed should have done more to determine the truth of

what they said. Nonetheless, the failure to do what should have been done is not actual malice.

D. The Award Of Damages Is Inconsistent With Plaintiff's Theory Of The Case

The prosecutor says her reputation was damaged by the publication of the letter. For the prosecutor's reputation to be damaged, the readers would have to believe the truth of the letter. It would not damage the prosecutor's reputation if the readers believed the charges contained in the letter were false. There was no proof of out-of-pocket expenses, and the damage claim related solely to a claim for loss of reputation. If readers would have immediate serious doubts as to the truth or a high degree of awareness of probable falsity, the prosecutor's reputation could never have been damaged.

Every reader of *Buzz* had the same information provided to the newspaper. All were aware of the nature of the charges, the fact they were made by a convict, and the circumstances as outlined in the letter. The prosecutor is faced with the dilemma that in order to establish liability, she was required to establish that the letter was inherently incredible.

Yet if the letter were inherently incredible, it could not sustain a damage award. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court allowed a recovery in defamation actions only for actual injury. In *Douglas v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1144 (7th Cir. 1985), Judge Posner wrote that plaintiffs may not "throw themselves on the generosity of the jury; if they want damages, they must prove them."

E. An Independent Review Of The Record Does Not Support a Finding Of Actual Malice

There is a duty on both the trial judge and reviewing judges to determine whether there is clear and convincing proof of constitutional actual malice. In *Bose Corp. v. Consumers*

Union of U.S., Inc., 466 U.S. 485, 514 (1984), this Court held that judges in actual malice cases have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989), (citing *Bose*, 466 U.S. at 510-11). The rationale for this rule was explained by this Court in *Connaughton* as follows:

> This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of "breathing space" so that protected speech is not discouraged.

Id. at 685-86 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

The trial court's analysis stopped at concluding that a convict was an unreliable source, especially because he was making charges against the prosecutor who was going to prosecute him. What this analysis ignores is that a convict prior to trial has no motive to make false charges and, in fact, every incentive not to lie, especially to the community at large. If the charges prove false, the convict can expect no consideration from a sentencing judge.

Furthermore, there was no indication that an investigation would receive anything other than denials if the newspaper had been able to obtain a comment from the prosecutor or access to prisoners. The fact that one expected denials would not establish knowledge of falsity. "Of course, the press need not accept 'denials, however vehement; such denials are so commonplace in the world of polemical charge and counter charge that, in themselves, they hardly alert the conscientious

reporter to the likelihood of error.'" *Id.* at 691 n.37 (quoting *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (1977)).

Forgotten in any court's analysis is the fact that if the *Buzz* had sufficient information to state that the charges were false, it could have published the fact of the false charge made by a convict awaiting trial as a story in and of itself. This story, however, would not have been justified. Without the benefit of information developed after the fact, and as a result of the subpoena powers of the Court, this letter might well have been true. One can understand a convict's wanting revenge against the prosecutor who has convicted him after sentencing, but it is difficult to conceive why this type of letter prior to the trial in a situation where the trial would undermine his credibility and guarantee a lack of mercy on the part of the sentencing judge.

In this case everything known to the newspaper was conveyed to any member of the public who read the letter. The headlines stated that the writer was a convict. The nature of the charges was spelling out in the letter. There was no indication that the newspaper was endorsing the letter-writer's charge. All that was conveyed was that this letter was received.

The very fact of the prosecutor's suit perversely establishes a lack of actual malice on the part of the publisher. Unless the letter were persuasive, it could inflict no damage. If it were transparently false, the letter could have been dismissed as baseless hyperbole. The passion and prose and the offer to take a lie detector test would have meant nothing. The very act of suing and seeking damages supports the fact that the letter is believable.

What had to disturb the prosecutor was the letter's believability. But this believability prevents a finding of actual malice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CONRAD M. SHUMADINE *
WILLCOX & SAVAGE, P.C.
One Commercial Place, Ste 1800
Norfolk, Virginia 23510-2197
(757) 628-5500

* Counsel of Record

APPENDIX

APPENDIX A

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF ROANOKE

LAW NO.: CL 02-132

JOAN ZIGLAR,

Plaintiff,

v.

MEDIA SIX, INC. d/b/a CABLE 6,CABLE6.COM, THE "*buzz*" NEWSPAPER, AND ROARK MEDIA,

CHARLES B. ROARK
107 Courtney Terrace
Martinsville, VA 24115,

ERROL W. WALLACE, JR.
101 Wood Street, Apt. E3
Martinsville, VA 24112

and

ZA'KEE P. J. TAHLIB
Martinsville City Farm
200 Clearview Drive
Martinsville, VA 24112,

Defendants.

Serve: Philip G. Gardner
Dominion Bank Building, 4th Floor
231 East Church Street
Martinsville, VA 24112,
Registered Agent,

MOTION FOR JUDGMENT

COMES NOW the plaintiff, Joan Ziglar, by counsel, and moves this Court for judgment against the defendants, Media Six, Inc., Charles B. Roark, Errol W. Wallace, Jr. and Za'Kee P.J. Tahlib, on the grounds and in the amounts set forth below:

PARTIES

1. Joan Ziglar (hereinafter "Ms. Ziglar") is the Commonwealth's Attorney for the City of Martinsville, Virginia.

2. Defendant Media Six, Inc. is a Virginia corporation which operates "*buzz*," a newspaper circulated in Martinsville, Henry County, the City of Roanoke, and other communities in the Commonwealth of Virginia.

3. Defendant Charles B. Roark (hereinafter "Mr. Roark") is President of Media Six, Inc. and publisher of "*buzz*," who resides in Martinsville, Virginia.

4. Defendant Errol W. Wallace, Jr. (hereinafter "Mr. Wallace") is an editor and reporter for "*buzz*" who resides in Martinsville, Virginia.

5. Defendant Za'Kee P.J. Tahlib (hereinafter "Mr. Tahlib") is a private individual currently incarcerated in the Martinsville City Jail.

VENUE

6. Venue is proper in the Circuit Court for the City of Roanoke, pursuant to Virginia Code § 8.01-262 because (a) the cause of action, or a part thereof, arose, in the city of Roanoke when defendants published the below referenced statements there, and (b) defendants regularly conduct affairs or business activity in the City of Roanoke.

STATEMENT OF FACTS

7. Paragraphs 1-6 of this Motion for Judgment are re-alleged and reincorporated herein by reference.

8. On or about November 9, 2001, defendants published an article in "*buzz*" entitled, "Convict Speaks Out Against Joan Ziglar" (hereinafter "the article.") A copy of this article is attached as Exhibit A and incorporated herein by reference.

9. Upon information and belief, the article was also published on Media Six, Inc.'s website: http:\\www.cable6.com.

10. Statements in the article published by defendants were false and defamatory as to Ms. Ziglar in the following particulars:

a. Za'Kee P.J. Tahlib is incarcerated on pending charges that were "trumped up . . . for personal reasons" by Ms. Ziglar;

b. Mr. Tahlib knew Ms. Ziglar on a personal level four years ago after he became romantically involved with Ms. Ziglar's sister, Cathy Ziglar;

c. Cathy Ziglar told Mr. Tahlib that Joan Ziglar told her to stop seeing Mr. Tahlib because he was an ex-offender, after which Cathy Ziglar, Joan Ziglar and Tahlib had an argument in the parking lot of the Old Red Carpet Inn Motel on 220 South, during which Mr. Tahlib cursed Joan Ziglar out for meddling in his affair with Cathy Ziglar;

d. Mr. Tahlib told Ms. Ziglar he would continue to see her sister, notwithstanding her objections, and there was "not a mother-f****** thing [she] could do but kiss my a** and like it";

e. Ms. Ziglar told Mr. Tahlib that she may not stop his affair with Cathy at that point in time, but if Mr. Tahlib "ever stepped [his] foot in the Martinsville

City Jail, [she] would see to it that [he] never got out";

f. Mr. Tahlib saw Ms. Ziglar at a post office, at which time she stared at him with hatred in her eyes, and he asked her why she was staring at him now that he "wasn't f****** [her] sister anymore, so [she] could stop hating [Mr. Tahlib]";

g. Ms. Ziglar stated during a conversation at the post office that she would be seeing Mr. Tahlib sooner than he thought, and "she was going to fix [Mr. Tahlib] and [his] smart mouth";

h. Mr. Tahlib has been charged by Ms. Ziglar for something he had nothing to do with;

i. Ms. Ziglar conjured up a scheme to implicate Mr. Tahlib with no physical or DNA evidence, or an eyewitness;

j. Ms. Ziglar made a deal with a witness, "Ramsey" (sic) (Ramzee Shareef), for him to lie to the grand jury to implicate Mr. Tahlib;

k. Ms. Ziglar "screwed up" the Lisa Thomas murder case;

l. Ms. Ziglar has not tried a case as a Commonwealth's Attorney, nor has she won any case in court as a Commonwealth's Attorney;

m. Ms. Ziglar has "messed up several good cases and pushed her mess-up to her assistant, 'D.A. Johnson' (James A. Johnson)";

n. Ms. Ziglar seeks the death penalty in every murder case;

o. Ms. Ziglar is "very paranoid toward most of the public, and especially to all black men";

p. Ms. Ziglar has shown prejudice toward Mr. Tahlib because of his Muslim name and because of their prior encounters as referenced above;

q. other men and women are in the same position as Mr. Tahlib but are afraid to challenge Ms. Ziglar; and

r. Ms. Ziglar gave Mr. Tahlib's case to D.A. Johnson because she felt Mr. Tahlib was going to expose her prior "run-ins" with Mr. Tahlib.

11. Ms. Ziglar has had no prior relationship with Mr. Tahlib, other than to have met him once when she was an assistant public defender. The conversations described in the article were manufactured.

12. Mr. Tahlib was charged for the murder of Richard Ross based on credible evidence. The charges were not brought for "personal reasons," out of vindictiveness, or any improper purpose. Further, Mr. Tahlib was changed with first-degree murder, not capital murder.

13. Ms. Ziglar has no sister named Cathy Ziglar. Ms. Ziglar has a sister named Cathy Amos. Cathy Amos has never had a romantic relationship with Mr. Tahlib, and has, in fact, had no relationship to him whatsoever, beyond knowing that he was at one time an employee of a company for which she worked.

14. Ms. Ziglar faithfully and impartially fulfills the duties of her office. She serves the citizens of Martinsville with the highest standards of professionalism and competence.

15. Ms. Ziglar did not make a deal with Ramzee Shareef, a witness against Mr. Tahlib at the grand jury, for him to give false testimony. Ms. Ziglar has never attempted to mislead a grand jury, and she has never sought to illicit false testimony from any witness at a grand jury proceeding, which would not only jeopardize her license to practice law, but would constitute felony offenses.

16. Ms. Ziglar exercises her authority impartially and fairly. She has not abused her authority; rather, she has fulfilled her commitment to the citizens of Martinsville by prosecuting crimes in violation of the law. She has tried cases as a Commonwealth's Attorney in which she has won convictions. She has not mishandled cases or blamed others for her mistakes.

17. Ms. Ziglar treats persons fairly, without regard to race or religion.

18. Ms. Ziglar did not assign Mr. Tahlib's case to an assistant because she feared Mr. Tahlib would expose the "run-ins" described in the article. Ms. Ziglar delegated some of her responsibility to James A. Johnson due to her heavy caseload. At the time, Ms. Ziglar was involved in prosecuting another murder case.

19. The article was widely published in the City of Martinsville, Henry County, the City of Roanoke, and in other cities, counties and towns in Virginia, and, upon information and belief, via the Internet. The article was published in places where Ms. Ziglar and her family have lived and worked for many years.

20. The article was edited by Errol W. Wallace, Jr., who was, at all times relevant to the writing and publication of the article, an agent and/or employee of Media Six, Inc., and was acting within the scope of his agency and/or employment.

21. The article was edited and/or approved for publication by Charles B. Roark, who was, at all times relevant to the writing and publication of the article, an agent or employee of defendant Media Six, Inc., and was acting within the scope of his agency and/or employment.

22. Each and every false and defamatory statement published by defendants of or concerning Ms. Ziglar as described herein are statements of defendants, and defendant Media Six, Inc. is vicariously liable to Ms. Ziglar on account

of the employment and agency of defendants Charles B. Roark and Errol W. Wallace, Jr. with the "buzz" newspaper.

23. Defendant Media Six, Inc. is liable to Ms. Ziglar for all damages proximately caused by the false and defamatory statements published in "*buzz*" and by its employees or agents.

24. The article and statements by defendants were libelous *per se*, made with actual malice, knowledge of the false statements contained therein, and/or with reckless disregard for the truth. Defendants maliciously and intentionally sought to, and did, injure Ms. Ziglar.

25. Defendants either knew their statements were false, or believing them to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts upon which the publication was based, and therefore, the defendants were negligent in publishing the statements of or concerning Ms. Ziglar.

26. Defendants Media Six, Inc.'s, Mr. Roark's and Mr. Wallace's actual malice, reckless disregard for the truth and negligence consisted of, among other things, the following:

a. failure to interview Joan Ziglar prior to publishing the false and defamatory statements in the article;

b. failure to take any steps whatsoever to inquire whether Joan Ziglar had a sister named Cathy Ziglar, or to interview Cathy Amos prior to publishing the false and defamatory statements in the article;

c. failure to interview James A. Johnson prior to publishing the false and defamatory statements in the article;

d. failure to interview persons with knowledge of the criminal investigation of the murder of Richard Ross prior to publishing the false and defamatory statements in the article;

e. failure to interview and inquire of Mr. Tahlib the basis for his charges, or the purpose of his comments to the newspaper prior to publishing the article;

f. failure to take any steps whatsoever to determine the truth or falsity of statements made by Mr. Tahlib prior to publishing them;

g. editing and re-writing Mr. Tahlib's statements to make them more articulate, and hence, credible; and

h. deliberately publishing the article, knowing of its falsehood or probable falsehood, in order to have maximum adverse impact on Ms. Ziglar's reputation.

27. Joan Ziglar, Cathy Amos, James A. Johnson, and persons with knowledge of the Ross investigation would have directly contradicted the false and defamatory statements in the article had defendants exercised even scant care and contacted those persons prior to publishing the article.

28. Defendant Tahlib's actual malice, reckless disregard for the truth, and negligence consisted of, among other things, the following:

a. making false and defamatory statements concerning Ms. Ziglar, knowing those statements to be false; and

b. deliberately and maliciously defaming Ms. Ziglar because she made a professional decision which was adverse to his interests.

29. The contents of the article were authorized and ratified by "*buzz*," Media Six, Inc., defendant Charles B. Roark, and defendant Errol W. Wallace, Jr.

30. The defamatory statements in the article created and made apparent a substantial danger to Ms. Ziglar's reputation. The statements were defamatory *per se* because they falsely imputed to her the commission of a crime involving moral turpitude; imputed to her unfitness to perform, or lack of integrity in the performance of, the duties of a Common-

wealth's Attorney; and necessarily prejudiced Ms. Ziglar in her profession. The statements published by defendants falsely impute to Ms. Ziglar violation of the Rules of Professional Conduct applicable to her as an attorney in Virginia, and as a Commonwealth's Attorney for the Commonwealth of Virginia, including; but not limited to, Rule 8.4; they falsely impute to Ms. Ziglar the commission of a Class 5 felony, to wit: violation of Virginia Code § 18.2-436 and § 18.2-434.

31. As a proximate result of the defendants' defamation, malice, and negligence, Ms. Ziglar has been caused to suffer actual damages, including, but not limited to, impairment of reputation, diminished standing in the community, personal humiliation, injury and embarrassment, emotional distress, mental anguish, and professional and business harm, much of which will endure permanently. Ms. Ziglar is entitled to presumed damages for all per se defamation alleged herein.

WHEREFORE, the plaintiff, by counsel, moves for judgment against the defendants, jointly and severally, in the amount of Two Million Dollars ($2,000,000.00) compensatory damages, plus prejudgment interest thereon from November 9, 2001, pursuant to Virginia Code Ann. §8.01-382, plus her costs expended hereon; plaintiff further moves for judgment against Media Six, Inc. in the amount of One Million Dollars ($1,000,000.00) punitive damages;

* * * *

EXHIBIT A

buzz Letters

Convict speaks out against Joan Ziglar

Dear Kip Wallace and Charles Roark,

I am an inmate at the Martinsville City Jail; I'm currently serving a 120-month sentence for the Feds in Beaver, WV. I am here on pending charges that have been trumped up on me for personal reasons that Joan Ziglar is holding over my head.

I knew J.Z. on a more personal level four years ago. In September '97, I worked at American Red Level off Rives Rd. While working there, I met a woman that I worked with everyday. The woman and I became romantically involved. The woman's name was Cathy/Kathy Ziglar, told to me by her that she was Joan Ziglar's sister. She told me that Joan told her to stop seeing me because I was an ex-offender, and she didn't think I would be right for her.

Well, Kathy and I continued to see one another until the night she and Joan and I had an argument in the parking lot of the old Red Carpet Inn Motel on 220 South. I cursed Joan out for meddling in my affair with Kathy. I told her that I would continue to see Kathy, and it's not a mother-f****** thing she could do but kiss my a** and like it. She told me that she may not be able to stop me then, but if I ever stepped my foot in the Martinsville City Jail, she would see to it that I never get out.

Several months passed, and I saw J.Z. at the post office on Church St. She stared at me with hatred in her eyes, so I asked her why in the hell she was staring at me, that I wasn't f****** her sister anymore, so she should stop hating me. She stated that she'd be seeing me sooner than I thought, and that she was going to fix me and my smart mouth.

Well, at the time I was a very high-profiled drug dealer, I owned homes, six cars, and wore about $75,000 in diamonds and gold and platinum. I made about $15,000 a day, sometimes more. I had to hire a bodyguard that I paid $1,500 and 2 oz. of crack cocaine a week for bodyguarding my wife, my children, and myself.

Now I'm charged for something I had nothing to do with. The person who killed Ross has written a confession letter, and Joan has it and several of my family members. But she has conjured up a scheme to implicate me in this case with "NO Physical or DNA Evidence"—not even an eye-witness. She made a deal with Ramsey to lie at the Grand Jury and to implicate me more. I want to go into depth and details of the matter, but not on paper. This woman is abusing her authority and is playing behind the Bible. This woman has the verve to attack y'all because y'all said she 'SCREWED-UP" . . . well, she did. No one else in this world stated that Lisa Thomas' murderer was "For Hire" except J.Z.

How in the Sam-Hell can she say this was a Murder For Hire when #1 the juvenile has not confessed or implicated anyone else; #2 the Martinsville Police Department has not arrested anyone else related to or involved in this case; and #3 a question: what if the juvenile confessed and says he killed Thomas out of "Rage of Passion," and that they could have been lovers, etc., etc. Then Joan will be looking really stupid, just like she looked at the "FACE-OFF."

This woman screams "CAPITAL MURDER" on every damn killing in the city, but yet she has not completely trialed Commonwealth's Attorney case nor has she won any in court. She has messed up several good cases and pushed her mess-up to her assistant D.A. Johnson.

She claims to be a lady of the Lord, but every time she deals with a murder, she always screams Capital Murder and asks for the damn Death Penalty on everyone. This woman is

out of control and very vindictive. She is too personal to be holding this office. She is very paranoid toward most of the public, and especially to all black men. And as we know, the City of Martinsville is very prejudiced towards the Muslims in this town. Let me clarify this: "I am not a Muslim." Still, Joan has shown prejudice towards me because of my name and our bad encounters. I changed my name because it coincides with my children and their mother's name.

I want this to be known to the public because I that feel I've fallen victim to J. Ziglar and that other men and women are in my same situation but are afraid to challenge her. She gave my case to Johnson because she felt I was going to expose our run-ins.

Please address this issue in the *buzz* and on Cable 6 A.S.A.P.

I'm willing to take a polygraph test to confirm the statements I've made. And I challenge J. Ziglar to take one as well.

Thank you for your
valuable time and cooperation,
Za'Kee P.J. Tahlib

APPENDIX B

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF ROANOKE

[Filed MAR 12, 2002]

Law No. CL 02-132

JOAN ZIGLAR,

Plaintiff,

v.

MEDIA SIX, INC., CHARLES B. ROARK,
and ERROL W. WALLACE, JR.,

Defendants.

DEMURRER

NOW COME, Charles B. Roark, Errol W. Wallace, Jr., and Media Six, Inc., by and through their undersigned attorney, and in response to a Motion for Judgment filed by plaintiff, Joan Ziglar, they file this Demurrer and in support thereof state as follows:

1. The specific statements alleged to be defamatory that are referenced in paragraph 10, of the Motion for Judgment are not defamatory to the plaintiff and/or are opinions of the author of the letter which are protected by the First Amendment;

2. The exhibit attached as Exhibit A to the Motion for Judgment was not written by any of the defendants herein nor was it an "article" and contains merely opinions of the letter writer and not those of any of the herein-named defendants and the right of the defendants to publish the opinions of individuals as they pertain to public officials is protected by the First Amendment;

3. Publishing a letter without verifying the said facts concerning a public official does not provide a basis for a defamation action, *St. Amont v. Thompson* 390 U.S. 727 (1968)

For the above reasons, the defendants, by counsel, demur to this action and move this Court to dismiss this action with prejudice.

Respectfully submitted,

MEDIA SIX, INC.
CHARLES B. ROARK
ERROL W. WALLACE, JR.

By /s/ Jonathan Rogers
JONATHAN ROGERS
Of Counsel

Jonathan Rogers (VSB #14298)
JONATHAN ROGERS, P.C.
P.O. Box 2886
Roanoke, VA 24001-2886
(540) 985-8686
(540) 985-6223 (facsimile)

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Demurrer was mailed to R. Lee Livingston, Esquire, Tremblay & Smith, LLP, P.O. Box 1585, Charlottesville, VA 22902 this 12th day of March, 2002.

/s/ Jonathan Rogers
JONATHAN ROGERS

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF ROANOKE

[Filed MAR 14 2002]

Law No. CL 02-132

JOAN ZIGLAR,

Plaintiff,

v.

MEDIA SIX, INC.,

Defendant.

DEMURRER

NOW COMES, Media Six, Inc., by and through its undersigned attorney, files this Demurrer and in support thereof state as follows:

The Motion for Judgment fails to allege facts against Media Six, Inc., as the only allegation is that Media Six, Inc., "operates buzz." This is an insufficient allegation upon which to hold Media Six, Inc. liable.

Respectfully submitted,

MEDIA SIX, INC.
CHARLES B. ROARK
ERROL W. WALLACE, JR.

By /s/ Jonathan Rogers
JONATHAN ROGERS
Of Counsel

Jonathan Rogers (VSB #14298)
JONATHAN ROGERS, P.C.
P.O. Box 2886
Roanoke, VA 24001-2886
(540) 985-8686
(540) 985-6223 (facsimile)

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Demurrer was mailed to R. Lee Livingston, Esquire, Tremblay & Smith, LLP, P.O. Box 1585, Charlottesville, VA 22902 this 14th day of March, 2002.

/s/ Jonathan Rogers
JONATHAN ROGERS

APPENDIX C

TWENTY-THIRD JUDICIAL CIRCUIT
OF VIRGINIA

CIRCUIT COURT FOR THE COUNTY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF SALEM

[LOGO]
COMMONWEALTH OF VIRGINIA

CLIFFORD R. WECKSTEIN, JUDGE
ROANOKE CITY COURTHOUSE
315 CHURCH AVENUE, S.W.
P. O. BOX 211
ROANOKE: VIRGINIA 24002-0211
(540) 853-2435
FAX (540) 853-1040
E-MAIL: CLIFFRKE@AOL.COM

February 18, 2003

R. Lee Livingston, Esquire
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P. O. Box 1585
Charlottesville, Virginia 22902-1585

Jonathan. Rogers, Esquire
Jonathan Rogers, P.C.
P.O. Box 2886
Roanoke, Virginia 24001-2886

Joan Ziglar v. Media Six, Inc., Charles B. Roark and Errol W. Wallace, Jr., CL02-132, Circuit Court of the City of Roanoke

Dear counsel:

The question before the court is whether an elected public prosecutor can proceed with her suit against a newspaper and members of its editorial staff who published letter to the editor that, she says, contained defamatory falsehoods about her. The answer is yes.

"The First Amendment rights of free speech and free press often clash with the interests served by defamation law. The press exists in large part to report on issues of public concern. However, individuals possess a right not to be subjected to falsehoods that impugn their character."[1] This case requires "the delicate and sensitive task of accommodating the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation."[2]

Joan Ziglar, the plaintiff, is the Commonwealth's Attorney of the City of Martinsville. Her office prosecuted Za' Kee P.J. Tahlib for murder. Tahlib wrote a letter which *Buzz*, a general-circulation newspaper, published. According to Ziglar's motion for judgment, defendant Errol Wallace, an editor at *Buzz*, edited the letter to make it more readable, defendant Charles Roark, the newspaper's publisher, approved the publication, and defendant Media Six, the company that owns *Buzz*, then published the letter in *Buzz* and on Media Six's Internet website. In addition to suing Media Six, Roark, and Wallace, Ziglar initially named Tahlib as a defendant. She has nonsuited her claim against him.

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[1] David Hudson, *Defamation and the First Amendment*, The Freedom Forum First Amendment Center, at http://www.freedomforum.org/templates/document.asp?document ID=14655> accessed February 8, 2003.

[2] *Oilman v. Evans*, 750 F.2d 970, 974 (D.C. Cir. 1984). *cert. denied* 471 U.S. 1127 (1985) (*en banc*).

Each defendant has filed a demurrer, a pleading that says, in effect, that even if what the plaintiff states in her suit papers is true, she is not entitled to be in court.[3] A demurrer tests only whether the plaintiff's factual allegations are sufficient to permit her to maintain a lawsuit, not whether she will prevail on the merits of her case.[4] The court, when ruling on a demurrer, accepts the truth of all statements of material fact in the plaintiff's motion for judgment, draws all inferences in the light most favorable to her case,[5] and recites the facts of the case as they are stated in the motion for judgment.[6] Under the Rules of the Supreme Court of Virginia, the offending publication is incorporated in the motion for judgment, since it was filed with and mentioned in the pleading.[7]

In the law of defamation, false statements of fact that:

- a person has committed a felony of moral turpitude or crime that is punishable by imprisonment in a state or federal institution; or that
- injure a person in his or her profession; or that
- impute that a person is unfit to perform the duties of an office or of gainful employment, or that
- a person lacks integrity in carrying out the duties of his or her office or job

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[3] *See* James W. McIlhaney, *Trial Notebook: Litigation Traps*, 29 LITIGATION No. 1, 61, 62 (2002).

[4] *Thompson v. Skate America, Inc.*, 261 Va. 121, 128, 540 S.E.2d 123 (2001); *Fun v. Virginia Military Institute*, 245 Va. 249, 252, 427 S.E.2d 181 (1993).

[5] *Woods v. Mendez*, 265 Va. 68, 76, ___ S.E.2d. ___ (2003); *Fueste v. Riverside Healthcare Ass'n.*, 265 Va.127, 131-32, ___ S.E.2d ___ (2003).

[6] *Fuste*131-32.

[7] Rule 1:4 (i).

are known as libel or slander per se, entitling the person who has been maligned to recover for injury to reputation, even if he or she cannot demonstrate any financial loss.[8] Subject to exceptions not relevant in this case, anyone who publishes (that is, who repeats) a libel or slander is as culpable as the person who originates the falsehood.[9]

In the letter published in *Buzz*, Tahlib began by describing himself as someone who—though then serving a ten-year federal prison sentence—had been "a very high-profiled drug dealer" who "owned homes, six cars, and wore about $75,000 in diamonds and gold and platinum." (That is, drawing the inferences in the light most favorable to the plaintiff, Tahlib buttressed his credibility by first admitting negative things about himself.)

Notwithstanding that history, Tahlib wrote, he was in Martinsville "charged for something [he] had nothing to do with." Commonwealth's Attorney Ziglar had "trumped up" charges against him, he said, "for personal reasons," because of an intimate relationship that he had had with a "Cathy/ Kathy Ziglar, told to me by her that she was Joan Ziglar's sister." Because of this relationship, Tahlib wrote, he had had at least two personal confrontations with Commonwealth's Attorney Ziglar. Animus toward him, he stated, caused the Commonwealth's Attorney not only to "conjure up a scheme to implicate me in this case" but also to make a deal with a witness "to lie at the Grand Jury and to implicate me even more." In additional derogatory statements about Ziglar, Tahlib charged her with dishonesty, hypocrisy, misfeasance, bigotry, and incompetence as Commonwealth's Attorney.

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[8] *Fuste*, 265 Va. at 132-33; *Schnupp v. Smith*, 249 Va. 353, 360, 457 S.E.2d 42 (1995); *M. Rosenberg & Sons, Inc. v. Craft*, 182 Va. 512, 518, 29 S.E.2d 375, 151 A.L.R. 1095 (1944).

[9] *See Watt v. McKelvie*, 219 Va. 645, 248 S.E.2d 826 (1978); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988); *c.f. WJLA-TV v. Levin*, 264 Va. 140, 153, 564 S.E.2d 383 (2002).

Tablib's allegations about Ziglar were untrue. She does not have a sister named Cathy (or Kathy) Ziglar, and never had the encounters that Tahlib described in his letter. The newspaper's editorial staff did nothing to investigate the accuracy of any of the letter's contents.

Though some of the statements in the letter clearly were no more than hyperbole or rhetorical flourish, anyone reading it would have understood that the writer asserted—as fact—that Ziglar procured perjured testimony against Tahlib in order to obtain indictment on charges that she had "trumped up" out of personal animus.[10] The letter-writer set forth "facts" that, if believed, would lead readers to conclude that Ziglar lacked integrity in carrying out her office, "conjured up a scheme" to implicate an innocent man in a murder case, was guilty of malfeasance in office, and was unfit to perform the duties of Commonwealth's Attorney. Procuring perjury is a felony, punishable by up to ten years in prison.[11] "Among the distinct crimes for which a public official may be indicted at common law are nonfeasance, misfeasance and malfeasance in public office."[12]

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[10] *Food Lion, Inc. v. Melton*, 250 Va. 144, 150, 458 S.E.2d 580 (1995) ("A statement imputes the commission of a crime when it refers to matters that would naturally and presumably be understood by those hearing them as charging a crime."); *Moss v. Harwood*, 102 Va. 386, 388, 46 S.E. 385 (1904) ("Words must be construed in the plain and popular sense in which the rest of the world would naturally understand them.")

[11] Virginia Code (1950) §§ 18.2-10 (cum. supp. 2002), 18.2-434, -436 (Repl. vol. 1996).

[12] *State v. Winne*, 96 A.2d 63, 68 (1953) (citing 1 Burdick, Law of Crime (1946), sec. 272) (Vanderbilt, C.J.). "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." Code § 1-10 (Repl. vol. 2001).

Because Ziglar is a public official, her claim is governed by the rule of *New York Times Co. v. Sullivan*[13] and its progeny: Those who "hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth."[14] This is so because the "sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office. . . . Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks. . . .'"[15] Legitimate public interest extends to "anything which might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."[16] "[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."[17]

In defamation cases, "whether the evidence . . . is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is

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[13] 376 U.S. 254 (1964).

[14] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974).

[15] *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *New York Times v. Sullivan* at 270).

[16] *Gertz*, 418 U.S. at 345 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

[17] *Garrison v. Louisiana*, at 73.

sufficient to cross the constitutional threshold. . . ."[18] Judges make that independent decision on appeal; they also do so in the trial court. For example, before sending the case to the jury, or confirming a verdict, the judge must be satisfied that the public figure has produced sufficient evidence to support not only a finding that the statement was defamatory, but that it actually was false.[19] At this stage of the case, though, there is no "evidence in the record." The court must accept as true the factual statements in Ziglar's motion for judgment.[20]

Courts throughout the nation agree that "strongly worded letters to the editor" are important parts of "that robust and uninhibited commentary on public issues that is part of our national heritage."[21] Thus, "a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance" recently seemed, to the U.S. Court of Appeals for the Fourth Circuit, to be a prototypical example of "constitutionally protected speech."[22] However, the decided cases also unanimously agree, the rules used to evaluate actions against newspapers that publish allegedly defamatory letters to the editor are the same as those that apply in other defamation cases (notwithstanding a question that I posed during oral argument).[23]

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[18] *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

[19] *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986); *Bose*, 466 U.S. at 502-03 notes 20 and 21.

[20] *Fueste*, 265 Va. at 133; see notes 6-9 *supra*.

[21] *Kotlikoff v. The Community News*, 444 A2d 1086, 1092 (N.J. 1982).

[22] "[If an] assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech is entitled to constitutional protection because it is made in the employee's capacity as a private citizen and touches on matters of public concern." *Urofsky v. Gilmore*, 216 F.3d 401, 409 (4th Cir. 2000) (*en banc*), *cert. denied*, 531 U.S. 1070 (2001).

[23] *See Wood v. Dawkins*, 85 S.W.3d 312 (Tex. App. 2002); *Fort Worth Star-Telegram, v. Street*, 61 S.W.3d 704 (Tex. App. 2001); *Wampler v.*

A newspaper's letters to the editor column often is an important forum for expression of passionately-held opinions about issues of public concern.[24] To be sure, as the Supreme Court explained in *Milkovich v. Lorain Journal Co.*, there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'"[25] "However, '[p]ure expressions of opinion, not amounting to 'fighting words,'" are protected by the First Amendment of the Constitution of the United. States and Article 1, § 12 of the Constitution of Virginia. . . . Thus, 'speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action.'"[26] Put differently, only statements capable of being proven true or false are actionable.[27]

Milkovich dealt with a newspaper column on a sports page ("a traditional haven for cajoling, invective, and hyperbole," according to the Ohio Supreme Court).[28] Speaking through

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Higgins, 752 N.E.2d 962 (Ohio 2001) (Ohio's constitutional protections of opinion broader than those recognized by Supreme Court under federal constitution); *Tarpley v. Colfax Chronicle*; 650 So. 2d 738 (La. 1995), (letter about District Attorney); *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994); *Grau v. Kleinschmidt*, 509 N.E.2d 399 (Ohio 1987); *Di Bernardo v. Tonawanda Publishing Corp.*, 499 N.Y.S.2d 553 (N.Y. App. Div. 1986); *Weaver v. The Pryor Jeffersonian*, 569 P.2d 967 (Okla. 1977); *see generally*, George L. Blum, Annotation, *Defamation: Publication of Letter to Editor in Newspaper as Actionable*, 54 ALR. 5th 443 (1997); Donald M. Zupanec, Annotation, *Defamation: Publication of "Letter to Editor' in Newspaper as Actionable*, 99 A.L.R. 3d 573 (1980).

[24] *See Moriarity v. Lippe*, 294 A.2d 326, 332 (Conn. 1972).

[25] 497 U.S. 1 (1990).

[26] *Fueste*, 265 Va. at 132) (citations omitted).

[27] *See Moriarty v. Greene*, 732 N.E.2d 730, 739 (Ill. App. 2000); *Milkovich*, 497 U.S. at 17 (quoting *Falwell*, 485 U.S. at 50).

[28] *Milkovich*, 497 U.S. at 9 (quoting *Scott v. News-Herald*, 496 N.E.2d 699, 708 n. 4 (Ohio, 1986)).

Chief Justice Rehnquist, the Supreme Court held that a statement—whether phrased as opinion or conclusion—that left "the impression that the writer was seriously maintaining that petitioner committed the crime of perjury" was actionable.[29] So, too, is a statement that gives the impression that the writer seriously maintains that the plaintiff committed the crime of procuring perjury. "[T]he connotation that [Milkovich] committed perjury"—or that Ziglar procured it—"is sufficiently factual to be susceptible of being proved true or false."[30]

Last month, in *Fueste v. Riverside Healthcare Ass'n.*, the Supreme Court of Virginia held that the nature of physicians' professional responsibilities to their patients meant that statements that the doctors had "abandoned' their patients and that there were 'concerns about their competence' not only prejudice the doctors in the practice of their profession but also contain 'a provably false factual connotation.'"[31] The statements published by the defendants in this case similarly must be considered in the context of a Commonwealth's Attorney's professional responsibilities.

"[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring

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[29] *Id.* at 21 "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' *Id.* at 19.

[30] *Id.* at 21.

[31] *Fueste*, 265 Va. at 133 (internal citation omitted).

about a just one."[32] To breach that duty, to "[f]alsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law," or bring or maintain "a charge that the prosecutor knows is not supported by probable cause" would violate Ziglar's professional responsibilities, and subject her to disbarment or suspension of her license to practice law.[33] An assertion that a Commonwealth's Attorney "conjured up a scheme" to prosecute an innocent man, and "trumped up" charges against him not only has a particular connotation in the context of a prosecutor's professional responsibility,[34] it contains a provably false factual connotation in the same manner as does a statement that a physician "abandoned" his or her patients. (Although the defendants have, correctly, noted that the plaintiffs in *Fueste* were neither office holders nor public figures, that distinction is more relevant to the plaintiff's burden of proving "actual malice" than to the question of whether statements in Tahlib's letter were actionable.)

Our Supreme Court in *Fueste* also held that whether a particular "alleged defamatory statement is one of fact or opinion is a question of law and is, therefore, properly decided by a court instead of a jury."[35] It is enough, however, for the court, in ruling on demurrers, to hold, as I do, that some of the assertions in the Tahlib letter are factual and actionable. I need not, at this stage, determine which of the statements the defendants published might be "pure expressions of opinion."[36]

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[32] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[33] RULES OF THE SUPREME COURT OF VIRGINIA, Part 6, § 2, VIRGINIA RULES OF PROFESSIONAL CONDUCT, Rules 3.4 (c), 3.8.

[34] *See Fueste*, 265 Va. at 127; *Newton v. Rumery*, 480 U.S. 386, 394 (1987); *United States v. Rolle*, 204 F.3d 133, 138 (4th Cir. 2000).

[35] *Fueste*, 265 Va. at 132-33.

[36] *Id.* at 132 (quoting *Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97 (1985)).

Ziglar has pled—and to prevail, must prove—that the defendants acted with actual malice. Relying on the Supreme Court's decision in *St. Amant v. Thompson*,[37] the defendants assert that they had no duty to investigate the truth or falsity of Tahlib's letter, and that, therefore, no liability can attach for failure to do so. What is before the court, however, is not whether Ziglar ultimately can prevail in her suit, but only whether the facts, as she has stated them, set forth a claim upon which relief can be granted.

"'Actual malice,' as that term is used in defamation cases, is a term of art that is separate and distinct from traditional common-law notions of malice. It does not include ill will, spite, or evil motive; rather, it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true. 'Reckless disregard' is defined as a high degree of awareness of probable falsity, and the evidence must show that the defendant in fact entertained serious doubts as to the truth of the publication."[38] In pleading that the defendants acted with "actual malice," then, Ziglar makes an assertion of fact.[39] She says, and the court must at this stage believe, that when they published Tahlib's letter, defendants Roark, Wallace and Media Six either knew--in fact—that the letter's defamatory factual statements were false, or—in fact—entertained serious doubts about the truth of those defamatory factual statements, or both.

For the foregoing reasons, I find that the plaintiff has stated against each of the defendants a claim upon which she is entitled to seek relief; overrule each defendant's demurrer to the motion for judgment; and direct that the defendants file their grounds of defense on or before March 14, 2003. On

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[37] 37 390 US. 727 (1968).

[38] *HBO v. Harrison*, 983 S.W.2d 31, 36 (Tex. App. 1998).

[39] "Indeed, in *Herbert v. Lando*, 441 U.S. 153, 170 (1979), we referred in passing to actual malice as 'ultimate fact.'" *Bose*, 466 U.S. at 498, n. 15.

motion of the defendants, the court had partially stayed discovery. That stay is now vacated.

An order will enter, incorporating this opinion letter. Pursuant to Rule 1:13, the court dispenses with endorsement. Each defendant is deemed to have objected to entry of this order, and to the ruling contained in this opinion letter, for all of the reasons previously stated, both orally and in writing.

I send best regards to each of you.

Very truly yours,

/s/ Clifford R. Weckstein
CLIFFORD R. WECKSTEIN

APPENDIX D

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF ROANOKE

CL02-132

JOAN ZIGLAR,

Plaintiff,

v.

MEDIA SIX, INC., CHARLES B. ROARK,
and ERROL W. WALLACE, JR.,

Defendants.

ORDER

For the reasons stated in an opinion letter dated February 18, 2003, which is incorporated by this reference, the court holds that the plaintiff has stated against each of the defendants a claim upon which she is entitled to seek relief; overrules each defendant's demurrer to the motion for judgment; and directs that the defendants file their grounds of defense on or before March 14, 2003. On motion of the defendants, the court had partially stayed discovery. That stay is now vacated. And the foregoing is ADJUDGED and ORDERED.

Pursuant to Rule 1:13, the court dispenses with endorsement. Each defendant is deemed to have objected to entry of this order, and to the ruling contained in the opinion letter, for all of the reasons previously stated, both orally and in writing. The Clerk is directed forthwith to transmit a certified copy of this Order to R. Lee Livingston, Esquire, Tremblay & Smith, LLP, P.O. Box 1585, Charlottesville, Virginia 22902-1585, attorney for the plaintiff, and to Jonathan M. Rogers, Esquire,

Jonathan Rogers, P.C., P.O. Box 2886, Roanoke, Virginia 24001-2886, attorney for the defendants.

ENTER: February 18, 2003

/s/ Clifford R. Weckstein
Judge

APPENDIX E

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF ROANOKE

[Filed FEB 20, 2003]

Law Action No. CL02-132

JOAN ZIGLAR,

Plaintiff,

v.

MEDIA SIX, INC., *et al.*,

Defendants.

GROUNDS OF DEFENSE

COMES NOW, Media. Six, Inc., by and through, its undersigned attorney, and as its Grounds of Defense, states as follows:

1. It admits the allegation in paragraph 1 of the Motion for Judgment.

2. It denies the allegation in paragraph 2 of the Motion for Judgment but admits that it owns the rights to the "buzz" which is sold in the City of Martinsville and parts of Henry County, Virginia.

3. It admits that Charles B. Roark is the President of Media Six, Inc., and that he resides in the City of Martinsville. It denies all other allegations in paragraph 3 of the Motion for Judgment.

4. It denies the allegations in paragraph 4 of the Motion for Judgment but believes that Mr. Wallace resides in the City of Martinsville.

5. It is without sufficient information to admit or deny the allegations in paragraph 5 of the Motion for Judgment.

6. It denies the allegations in paragraph 6 of the Motion for Judgment and demands strict proof of the same.

7. Its answers to paragraph 1-6 are reasserted herein as if fully set out in response to paragraph 7 of the Motion for Judgment.

8. It denies that the "defendants published an article in 'buzz' entitled 'Convict Speaks Out Against Joan Ziglar' as alleged in paragraph 8 of the Motion for Judgment.

9. It denies that any "article" was published on a website as alleged in the Motion for Judgment.

10. It denies the allegations in paragraph 10 of the Motion for Judgment including all subparts (a)-(r), or in the alternative, as to Media Six, Inc., it states that it is without sufficient information to admit or deny the allegations and states affirmatively that many of the referenced statements were the opinions of the letter writer.

11. It is without sufficient information to admit or deny the allegations in paragraph 11 of the Motion for Judgment.

12. It admits that Mr. Tahlib was charged with first-degree murder but on information and belief states that the first-degree murder charge was not "based on credible evidence" but it is without sufficient information to admit or deny the remaining allegations in paragraph 12 of the Motion for Judgment.

13. It is without sufficient information to admit or deny the allegations in paragraph 13 of the Motion for Judgment.

14. It is without sufficient information to admit or deny the allegations in paragraph 14 of the Motion for Judgment but notes that those allegations are not facts but opinions.

15. It is without sufficient information to admit or deny the allegations in paragraph 15 of the Motion for Judgment.

16. It is without sufficient information to admit or deny the allegations in paragraph 16 of the Motion for Judgment but notes that most of those allegations are not facts but opinions.

17. It is without sufficient information to admit or deny the allegations in paragraph 17 of the Motion for Judgment but notes that most of those allegations are not facts but opinions.

18. It is without sufficient information to admit or deny the allegations in paragraph of the Motion for Judgment.

19. It denies the allegations in paragraph 19 of the Motion for Judgment but it admits that the "buzz" is distributed in the City of Martinsville and that Ms. Ziglar works and lives in the City of Martinsville.

20. It denies the allegations in paragraph 20 of the Motion for Judgment and demands strict proof of the same.

21. It denies the allegations in paragraph 21 of the Motion for Judgment and demands strict proof of the same.

22. It denies the allegations in paragraph 22 of the Motion for Judgment and demands strict proof of the same.

23. It denies the allegations in paragraph 23 of the Motion for Judgment and demands strict proof of the same.

24. It denies the allegations in paragraph 24 of the Motion for Judgment and demands strict proof of the same.

25. It denies the allegations in paragraph 25 of the Motion for Judgment and demands strict proof of the same.

26. It denies the allegations in paragraph 26 of the Motion for Judgment and notes that the allegations are conclusions of law.

27. It is without sufficient knowledge to admit or deny the allegations in paragraph 27 of the Motion for Judgment.

28. Paragraph 28 of the Motion for Judgment is not directed at it and calls for no response by it and none is given.

29. It denies that allegations in paragraph 29 of the Motion for Judgment and demands strict proof of the same.

30. It denies that allegations in paragraph 30 of the Motion for Judgment and demands strict proof of the same.

31. It denies that allegations in paragraph 31 of the Motion for Judgment and demands strict proof of the same.

32. All allegations not expressly admitted are hereby denied.

33. The plaintiff suffered no damages and is owed no compensation from Media Six, Inc.

FIRST AFFIRMATIVE DEFENSE

34. It is protected byte First Amendment to the United States Constitution and the progeny of the United States Supreme Court cases interpreting the same.

SECOND AFFIRMATIVE DEFENSE

35. On information and belief some of Mr. Tahlib's statements were true.

THIRD AFFIRMATIVE DEFENSE

36. Most of Mr. Tahlib's letter contained his opinions as opposed to facts and are not actionable.

Respectfully submitted,

MEDIA SIX, INC.

By /s/ Jonathan Rogers
Of Counsel

Jonathan Rogers, Esq.
VSB No. 14298
JONATHAN ROGERS, P.C.
P.O. Box 2886
Roanoke, VA 24001-2886
(540) 985-8686
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Grounds for Defense, was mailed to R. Lee Livingston, Esquire, Tremblay and Smith, L.L.P., P.O. Box 1585, Charlottesville, Virginia, 22902-1585, counsel for plaintiff, this 20th day of February, 2003.

/s/ Jonathan Rogers
Jonathan Rogers, Esquire

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF ROANOKE

[Filed FEB 20, 2003]

Law Action No. CL02-132

JOAN ZIGLAR,

Plaintiff,

v.

MEDIA SIX, INC., *et al.*,

Defendants.

GROUNDS OF DEFENSE

COMES NOW, Errol W. Wallace, Jr., by and through, his undersigned attorney, and as his Grounds of Defense, states as follows:

1. He admits the allegation in paragraph 1 of the Motion for Judgment.

2. He denies the allegation in paragraph 2 of the Motion for Judgment but admits that the "buzz" is sold in the City of Martinsville and parts of Henry County, Virginia. He is without sufficient information to admit or deny who "operates" the "buzz".

3. He is without sufficient information to admit or deny who it the current President of Media Six, Inc. He denies all other allegations in paragraph 3 of the Motion for Judgment.

4. He denies the allegations in paragraph 4 of the Motion for Judgment but admits that he resides in the City of Martinsville.

5. He is without sufficient information to admit or deny the allegations in paragraph 5 of the Motion for Judgment.

6. He denies the allegations in paragraph 6 of the Motion for Judgment and demands strict proof of the same.

7. His answers to paragraph 1-6 are reasserted herein as if fully set out in response to paragraph 7 of the Motion for Judgment.

8. He denies that the "defendants published an article in 'buzz' entitled 'Convict Speaks Out Against Joan Ziglar' as alleged in paragraph 8 of the Motion for Judgment.

9. He denies that any "article" was published on a web-site as alleged in the Motion for Judgment.

10. He denies the allegations in paragraph 10 of the Motion for Judgment including all subparts (a)-(r), or in the alternative, he states that he is without sufficient information to admit or deny the allegations and states affirmatively that many of the referenced statements were the opinions of the letter writer.

11. He is without sufficient information to admit or deny the allegations in paragraph 11 of the Motion for Judgment.

12. He admits that Mr. Tahlib was charged with first-degree murder but on information and belief states that the first-degree murder charge was not "based on credible evidence" but he is without sufficient information to admit or deny the remaining allegations in paragraph 12 of the Motion for Judgment.

13. He is without sufficient information to admit or deny the allegations in paragraph 13 of the Motion for Judgment.

14. He is without sufficient information to admit or deny the allegations in paragraph 14 of the Motion for Judgment but notes that those allegations are not facts but opinions.

15. He is without sufficient information to admit or deny the allegations in paragraph 15 of the Motion for Judgment.

16. He is without sufficient information to admit or deny the allegations in paragraph 16 of the Motion for Judgment but notes that most of those allegations are not facts but opinions.

17. He is without sufficient information to admit or deny the allegations in paragraph 17 of the Motion for Judgment but notes that most of those allegations are not facts but opinions.

18. He is without sufficient information to admit or deny the allegations in paragraph 18 of the Motion for Judgment.

19. He denies the allegations in paragraph 19 of the Motion for Judgment but he admits that the "buzz" is distributed in the City of Martinsville and that Ms. Ziglar works and lives in the City of Martinsville.

20. He denies the allegations in paragraph 20 of the Motion for Judgment and demands strict proof of the same.

21. He denies the allegations in paragraph 21 of the Motion for Judgment and demands strict proof of the same.

22. He denies the allegations in paragraph 22 of the Motion for Judgment and demands strict proof of the same.

23. He denies the allegations in paragraph 23 of the Motion for Judgment and demands strict proof of the same.

24. He denies the allegation in paragraph 20 of the Motion for Judgment and demands strict proof of the same.

25. He denies the allegations in paragraph 25 of the Motion for Judgment and demands strict proof of the same.

26. He denies the allegations in paragraph 2 . of the Motion for Judgment and notes that the allegations are conclusions of law.

27. He is without sufficient knowledge to admit or deny the allegations in paragraph 27 of the Motion for Judgment.

28. Paragraph 28 of the Motion for Judgment is not directed at him and calls for no response by him and none is given.

29. He denies that allegations in paragraph 29 of the Motion for Judgment and demands strict proof of the same.

30. He denies that allegations in paragraph 30 of the Motion for Judgment and demands strict proof of the same.

31. He denies that allegations in paragraph 31 of the Motion for Judgment and demands strict proof of the same.

32. All allegations not expressly admitted are hereby denied.

33. The plaintiff suffered no damages and is owed no compensation from him.

FIRST AFFIRMATIVE DEFENSE

He is protected by the First Amendment to the United States Constitution and the progeny of the United States Supreme Court cases interpreting the same.

SECOND AFFIRMATIVE. DEFENSE

On information and belief some of Mr. Tahlib's statements were true.

THIRD AFFIRMATIVE DEFENSE

Most of Mr. Tahlib's letter contained his opinions as opposed to facts and are not actionable.

Respectfully submitted,

ERROL W. WALLACE, JR.

By /s/ Jonathan Rogers
Of Counsel

Jonathan Rogers, Esq.
VSB No. 14298
JONATHAN ROGERS, P.C.
P.O. Box 2886
Roanoke, VA 24001-2886
(540) 985-8686
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Grounds for Defense, was mailed to R. Lee Livingston, Esquire, Tremblay and Smith, L.L.P., P.O. Box 1585, Charlottesville, Virginia, 22902-1585, counsel for plaintiff, this 20th day of February, 2003.

/s/ Jonathan Rogers
Jonathan Rogers, Esquire

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF ROANOKE

[Filed FEB 20, 2003]

Law Action No. CL02-132

JOAN ZIGLAR,

Plaintiff,

v.

MEDIA SIX, INC., *et al.*,

Defendants.

GROUNDS OF DEFENSE

COMES NOW, Charles B. Roark, by and through, his undersigned attorney, and as his Grounds of Defense, states as follows:

1. He admits the allegation in paragraph 1 of the Motion for Judgment.

2. He denies the allegation in paragraph 2 of the Motion for Judgment but admits that Media Six, Inc., owns the rights to the "buzz" which is sold in the City of Martinsville and parts of Henry County, Virginia.

3. He admits that he is the President of Media Six, Inc., and that he resides in the City of Martinsville. He denies all other allegations in paragraph 3 of the Motion for Judgment.

4. He denies the allegations in paragraph 4 of the Motion for Judgment but believes that Mr. Wallace resides in the City of Martinsville.

5. He is without sufficient information to admit or deny the allegations in paragraph 5 of the Motion for Judgment.

6. He denies the allegations in paragraph 6 of the Motion for Judgment and demands strict proof of the same.

7. His answers to paragraph 1-6 are reasserted herein as if fully set out in response to paragraph 7 of the Motion for Judgment.

8. He denies that the "defendants published an article in 'buzz' entitled 'Convict Speaks Out Against Joan Ziglar' as alleged in paragraph 8 of the Motion for Judgment.

9. He denies that any "article" was published on a web-site as alleged in the Motion for Judgment.

10. He denies the allegations in paragraph 10 of the Motion for Judgment including all subparts (a)-(r), or in the alternative, he states that he is without sufficient information to admit or deny the allegations and states affirmatively that many of the referenced statements were the opinions of the letter writer.

11. He is without sufficient information to admit or deny the allegations in paragraph 11 of the Motion for Judgment.

12. He admits that Mr. Tahlib was charged with first-degree murder but on information and belief states that the first-degree murder charge was not "based on credible evidence" but he is without sufficient information to admit or deny the remaining allegations in paragraph 12 of the Motion for Judgment.

13. He is without sufficient information to admit or deny the allegations in paragraph 13 of the Motion for Judgment.

14. He is without sufficient information to admit or deny the allegations in paragraph 14 of the Motion for Judgment but notes that those allegations are not facts but opinions.

15. He is without sufficient information to admit or deny the allegations in paragraph 15 of the Motion for Judgment.

16. He is without sufficient information to admit or deny the allegations in paragraph 16 of the Motion for Judgment but notes that most of those allegations are not facts but opinions.

17. He is without sufficient information to admit or deny the allegations in paragraph 17 of the Motion for Judgment but notes that most of those allegations are not facts but opinions.

18. He is without sufficient information to admit or deny the allegations in paragraph 18 of the Motion for Judgment.

19. He denies the allegations in paragraph 19 of the Motion for Judgment but he admits that the "buzz" is distributed in the City of Martinsville and that Ms. Ziglar works and lives in the City of Martinsville.

20. He denies the allegations in paragraph 20 of the Motion for Judgment and demands strict proof of the same.

21. He denies the allegations, in paragraph 21 of the Motion for Judgment and demands strict proof of the same.

22. He denies the allegations in paragraph 22 of the Motion for Judgment and demands strict proof of the same.

23. He denies the allegations in paragraph 23 of the Motion for Judgment and demands strict proof of the same.

24. He denies the allegations in paragraph 24 of the Motion for Judgment and demands strict proof of the same.

25. He denies the allegations in paragraph 25 of the Motion for Judgment and demands strict proof of the same.

26. He denies the allegations in paragraph 26 of the Motion for Judgment and notes that the allegations are conclusions of law.

27. He is without sufficient knowledge to admit or deny the allegations in paragraph 27 of the Motion for Judgment.

28. Paragraph 28 of the Motion for Judgment is not directed at him and calls for no response by him and none is given.

29. He denies that allegations in paragraph 29 of the Motion for Judgment and demands strict proof of the same.

30. He denies that allegations in paragraph 30 of the Motion for Judgment and , demands strict proof of the same.

31. He denies that allegations in paragraph 31 of the Motion for Judgment and demands strict proof of the same.

32. All allegations not expressly admitted are hereby denied.

33. The plaintiff suffered no damages and is owed no compensation from him.

FIRST AFFIRMATIVE DEFENSE

34. He is protected by the First Amendment to the United States Constitution and the progeny of the United States Supreme Court cases interpreting the same.

SECOND AFFIRMATIVE DEFENSE

35. On information and belief some of Mr. Tahlib's statements were true.

THIRD AFFIRMATIVE DEFENSE

36. Most of Mr. Tablib's letter contained his opinions as opposed to facts and are not actionable.

Respectfully submitted,

CHARLES B. ROARK

By /s/ Jonathan Rogers
Of Counsel

Jonathan Rogers, Esq.
VSB No. 14298
JONATHAN ROGERS, P.C.
P.O. Box 2886
Roanoke, VA 24001-2886
(540) 985-8686
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Grounds for Defense, was mailed to R. Lee Livingston, Esquire, Tremblay and Smith, L.L.P., P.O. Box 1585, Charlottesville, Virginia, 22902-1585, counsel for plaintiff, this 20th day of February, 2003.

/s/ Jonathan Rogers
Jonathan Rogers, Esquire

APPENDIX F

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF ROANOKE

CASE # CL02-132

JOAN ZIGLAR,

Plaintiff,

v.

CHARLES ROARK, *et al.*,

Defendants.

MOTION FOR JUDGMENT NOTWITHSTANDING JURY VERDICT DUE TO INSUFFICIENT EVIDENCE AND ERROR BY THE TRIAL COURT

COME NOW the Defendants, Charles Roark and Media Six, Inc., by counsel, in the above entitled cause of action and for their Motion for Judgment Notwithstanding Jury Verdict due to Insufficient Evidence and Error by the Trial Court the aforesaid Defendants would respectfully state unto the Court as follows, to-wit:

1.) That the jury verdict finding for the Plaintiff, Joan Ziglar, against the Defendants Charles Roark and Media Six, Inc., was not supported by the evidence at trial of the cause of action herein as there was no proof by the greater weight of the evidence that the alleged defamatory statement was false.

2.) That the jury verdict finding for the Plaintiff, Joan Ziglar, against the Defendants Charles Roark and Media Six, Inc., was not supported by the evidence at trial of the cause of action herein as there was no clear and convincing proof that the alleged defamatory statement was published with knowledge of its falsity or with reckless disregard for the truth.

3.) That the jury verdict finding for the Plaintiff, Joan Ziglar, against the Defendants Charles Roark and Media Six, Inc., was not supported by the evidence at trial of the cause of action herein as the evidence was insufficient to permit the conclusion that the Defendants in fact entertained serious doubts as to the truth of (the) publication, and in the absence of such doubts, Plaintiff cannot and has not shown the said Defendants acted with reckless disregard for truth or falsity, and accordingly the Plaintiff has not established actual malice by Defendants.

4.) That the jury verdict finding for the Plaintiff, Joan Ziglar, against the Defendants Charles Roark and Media Six, Inc., was not supported by the evidence at trial of the cause of action herein as said evidence did not establish that the Defendants had a high degree of awareness of probable falsity (of the publication).

5.) That the jury verdict finding for the Plaintiff, Joan Ziglar, against the Defendants Charles Roark and Media Six, Inc., was based upon evidence which should not have been admitted at the trial of the cause of action herein in that the trial court improperly permitted Plaintiff's expert witness, Dr. Edward Wasserman, to testify on the primary issue of the cause of action herein; whether or not it was reckless for the Defendants to publish the Tahlib letter.

6.) That the jury verdict finding for the Plaintiff, Joan Ziglar, against the Defendants Charles Roark and Media Six, Inc., should not be confirmed by the trial court for the reason the aforesaid jury which heard evidence at the trial of the cause of action herein was not permitted to hear testimony from Ginny Wray, Editor, Martinsville Bulletin, a Martinsville local newspaper; and also the jury herein was not allowed to view or read an editorial by the aforesaid Martinsville Bulletin, dated April, 2003, concerning the conduct of Plaintiff Ziglar following a jury trial in Martinsville, Virginia which editorial supports and corroborates allegations made

concerning Plaintiff Ziglar's conduct in the publication (or the Tahlib letter).

7.) That the jury verdict finding for the Plaintiff, Joan Ziglar, against the Defendants Charles Roark and Media Six, Inc.; was not supported by the evidence at trial of the cause of action herein as said evidence did not establish by the applicable standard of proof, proof by the greater weight of the evidence, that Plaintiff was damaged sufficiently to justify a monetary award in the amount of $75,000.00, and the damages award to Plaintiff in the amount of $75,000.00 was based on pure speculation and conjecture, with no basis in fact, and accordingly the amount awarded to Plaintiff was based on an arbitrary and capricious decision.

WHEREFORE, for the above and foregoing reasons Defendants pray the Court determine the said Defendants not liable for damages as to Plaintiff's Motion for Judgment notwithstanding the Jury Verdict returned to this Court after trial by jury on the 14th day of December, 2005, for the reason being the evidence adduced at trial herein was insufficient to support the jury's finding of liability against the Defendants and in Plaintiff's favor, for the additional reason the Trial Court herein committed error as alleged above, and for said reasons Defendants pray the Trial Court not confirm the jury's verdict and for any and all other relief just and proper in the premises herein.

Respectfully submitted,

CHARLES ROARK
MEDIA SIX, INC.

By /s/ Perry H. Harrold
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the above and foregoing pleading on opposing counsel herein as follows, to-wit: mailing a copy of same by First Class U.S. Mail, postage prepaid, on this 4th day of January, 2006, addressed to Mr. R. L. Morrison, WILLIAMS, MORRISON, LIGHT & MOREAU, Attorneys at Law, 317 Patton Street, Danville, Virginia 24541-1213.

/s/ Perry H. Harrold
PERRY H. HARROLD

PERRY H. HARROLD
Attorney at Law
Virginia State. Bar No. 22733
68 West Main Street
Post Office Box 1282
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(276) 638-6483

APPENDIX G

VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF ROANOKE

ORDER CL 02-132

JOAN ZIGLAR,

Plaintiff

v.

MEDIA SIX, *et al.*

Defendants

This matter came for trial on December 12, 2005, upon a Motion for Judgment by the Plaintiff seeking damages against the Defendants, jointly and severally, for defamation. The parties appeared in person and by counsel and announced themselves ready for trial.

There being no pretrial matters requiring the Court's attention, a jury panel of sixteen was called and sworn. The Court conducted voir dire. Two jurors were excused for cause and two replacements seated. The parties then conducted voir dire. There being no additional strikes for cause, the parties made their preemptory strikes. No party challenged the exercise of preemptory strikes and a jury of seven, (7), with one, (1), alternate was sworn and seated, to wit:

April M. S. Barrow
April C. Braden
Bertha A. Buckner
Harold B. Durham
Verna K. K. Jones
Jane N. McDaniel
Dana W. Schirm
Debra G. Wright

By random choice, out of the presence of the jury, Verna K. K. Jones was selected as the alternate juror.

The parties made their opening statements without objection. The Plaintiff then began the introduction of her evidence. At the end of the day, the jury was instructed not to discuss the case and to not have any contacts concerning the case and the Court recessed until the following day.

On December 13, 2005, the Court reconvened and the jury being present, the Plaintiff completed the presentation of her evidence. The Plaintiff rested her case in chief. The Defendants moved to strike the Plaintiff's evidence. After hearing argument, the Court denied the Motion to Strike for the reasons stated in open court, to which Defendants objected.

The Defendants then began the presentation of their evidence. At the end of the day, the jury was instructed not to discuss the case and to not have any contacts concerning the case and the Court recessed until the following day.

On December 14, 2005, the Court reconvened and the jury being present, the Defendants completed the presentation of their evidence. Plaintiff presented rebuttal evidence and the parties rested their cases. Defendants then renewed their Motion to Strike which the Court denied, to which ruling the Defendants objected.

Instructions were prepared for the jury. Plaintiff did not offer any instruction refused by the Court. Defendants offered Instruction Z which the Court refused, to which Defendants objected. The parties agreed upon a verdict form. The jury was then instructed and the parties made their closing arguments, without objections.

Plaintiff moved and Defendants agreed that the alternate juror be permitted to deliberate with the other jurors in reaching a verdict. The Court granted that motion and informed the jury that all eight members would consider the verdict.

The jury then retired to consider its verdict. During deliberations, the jury sent two questions to the Court. The Court, after consultation with counsel answered those questions in a manner agreed to by the parties. At approximately 9:30 PM the jury announced that it had reached a verdict and returned to the court room. The verdict was read in open court as follows:

> We, the jury, on the issues joined, unanimously:
>
> > Find our verdict for the plaintiff, Joan Ziglar, against the Defendants Media Six, Inc. and Charles Roark, and fix the plaintiff's damages in the sum of $75,000, with interest from November 9, 2001, until paid.
> >
> > Signed: Harold Durham, Foreperson

Upon Motion by the Defendants, the Court polled the jury individually. Each member of the jury affirmed the verdict. The jury was then excused.

Defendants requested leave to file post trial motions which the Court granted. The Defendants filed a Motion to Set the Verdict Aside as being contrary to the law and the evidence and excessive in amount, to which Plaintiff objected. The parties filed Memoranda of Law in support of their respective positions. The parties advised the Court that they would submit their arguments to the Court on the Memoranda filed. The Court, having maturely considered the issues overrules the Defendants' Motion to Set the Verdict Aside. Defendants' objection to the Courts ruling is noted and preserved.

Wherefore, upon the jury's verdict, the Court enters JUDGMENT for the Plaintiff, against the Defendants, jointly and severally in the amount of Seventy five thousand dollars, ($75,000), with interest thereon at the lawful judgment rate from November 9, 2001, until paid. The Plaintiff shall also recover her taxable costs from the Defendants.

The objections by the Defendants to the Court's rulings at trial and its overruling of their Motion to Set the Verdict Aside are hereby noted and preserved.

There being nothing further to be done, this cause shall be DISMISSED with PREJUDICE and shall be stricken from the docket. The Clerk shall certify copies of this Order to counsel of record.

SO ORDERED

Enter: March 27, 2006

/s/ Clifford R. Weckstein
Judge

Requested by:

/s/ Robert L. Morrison, Jr.
Robert L. Morrison, Jr.
Counsel for Plaintiff Joan Ziglar

Seen & objected to:

Perry M. Harrold
Counsel for Defendants Media Six, Inc.
And Charles Roark

A COPY TESTE BRENDA S. HAMILTON, CLERK
By /s/ [Illegible] Deputy Clerk

APPENDIX H

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND ON FRIDAY THE
8TH DAY OF SEPTEMBER, 2006

Circuit Court No. CL02-132
Record No. 061278

MEDIA SIX, INC., *et al.*,

Appellants,

v.

JOAN ZIGLAR,

Appellee.

FROM THE CIRCUIT COURT OF THE
CITY OF ROANOKE

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ [Illegible]
Deputy Clerk

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND ON FRIDAY THE
17TH DAY OF NOVEMBER, 2006

Circuit Court No. CL02-132
Record No. 061278

MEDIA SIX, INC., *et al.*,

Appellants,

v.

JOAN ZIGLAR,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 8th day of September, 2006 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk

A

(2)

No. 06-1127

Supreme Court, U.S.
FILED
MAR 14 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MEDIA SIX, INC. and
CHARLES ROARK,

Petitioners,

v.

JOAN ZIGLAR,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Virginia**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT L. MORRISON, JR.*
WILLIAMS, MORRISON, LIGHT
& MOREAU
317 Patton Street
Danville, Virginia 24541-1213
(434) 793-4912

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether publication of an accusation of criminal acts on the part of a Commonwealth's Attorney by a newspaper, whose employees admit that they had no evidence or facts upon which to base a belief that the accusations are true and; despite that, made no inquiry into the underlying facts, constitutes reckless indifference to truth or falsity.

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Fed.R.Evid. Rule 704 ..... 2, 14

STATUTES INVOLVED

VIRGINIA CODE SECTIONS CITED

***Va. Code Ann.* § 8.01-401.3.**

A. In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

B. No expert or lay witness while testifying in a civil proceeding shall be prohibited from expressing an otherwise admissible opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case. However, in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law.

RULES INVOLVED

FEDERAL RULES OF EVIDENCE CITED

Rule 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experienced, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data,

(2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 704

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

FACTUAL BACKGROUND

Respondent asserts that the Factual Background provided by the Petitioner is incomplete in material details which are crucial to this case. The Factual Background is restated.

In November, 2001, one Zakee Tahlib wrote a letter to "Roark and Kip Wallace" in which, among other things he described himself as a "highest profile drug dealer," serving time on federal charges and in jail, awaiting trial on state charges. Tahlib accused the Commonwealth's Attorney, Ziglar, of prosecuting him for revenge and personal motives and suborning perjury from a witness, "Ramsey," later identified at trial as Ramzee Shareef, in furtherance of her scheme. Tahlib was charged with first degree murder and robbery in Virginia state court but gave the impression that the murder charge was one of capital murder.

The letter asserted that Tahlib had carried on a sexual affair with Ziglar's sister, whom he identified as Cathy Ziglar. He claimed that Joan Ziglar, the Plaintiff had threatened him if he did not end the affair. According

to Tahlib, Joan Ziglar had trumped up the charges and suborned perjury against him because he had refused to do so.

Roark, one of the two named defendants at the time of trial, was an employee of Media Six and editor of its tabloid newspaper under the name of the "Buzz." Roark and Wallace, another employee of Media Six, published the letter, essentially verbatim, although it was edited to remove the obscenities, with which it was liberally supplied and correct some spelling errors.

In Petitioners' statement of the Factual Background, they fail to provide the following information, available in the trial transcript which is a part of the record:

At trial, both Wallace and Roark admitted that at the time of publication they had no evidence upon which to base a belief that any of the accusations contained in the letter were true:

> Q Did you have any facts that would – you testified that you understood that Mr. Tahlib was claiming he was charged with capital murder and that Ms. Ziglar was using false evidence to try to convict him of capital murder; is that correct?
>
> A I read that –
>
> Q That's your understanding?
>
> A Yes, sir.
>
> . . . .
>
> Q Did you know of any facts that would support the claim by Mr. Tahlib that Ms. Ziglar

v[illegible]using false evidence in trying to convict Mr. Ta[illegible]b of capital murder?

A No, sir.

(Testimony of E. Wallace, Trial Trans., Vol. I, pp. 82-83)

Q At the time that you published this letter you had no evidence of any sort from anybody, place, or thing that supported Mr. Tahlib's charges did you? None?

A No, sir.

(Testimony of C. Roark, Trial Trans., Vol. III, pp. 82-83)

Q You have no evidence at all to support your claim to belief that the letter was true did you? You've testified that from past; isn't that true?

A Yes, sir.

(Testimony of C. Roark, Trial Trans., Vol. III, pg. 119)

Although he attempted to avoid answering the question, Roark admitted that at the time of publication he had no reason to question Ziglar's professionalism, ethics or honesty:

Q Mr. Roark, let's look at a page from your deposition. A page from your deposition taken November 4, 2003, by Mr. Lee Livingston who was my predecessor in this case, in which you were asked the question at page 27, did you specifically have any concerns about Joan Ziglar's professionalism, integrity or ethics when you published the charges?

Answer: No, sir.

Do you see that?

A Yes, sir.

Q Is that your testimony?

A Yes, sir.

. . .

Q Answer my question, were you telling the truth when you were asked did you specifically have any concerns about her professionalism, integrity, ethics, when you published the Tahlib charges?

No, sir.

Was that the truth? That's the question I want answered.

A In regard to this subject –

Q Answer my question, was that the truth?

A Yes, sir.

Q Yes or no?

A Yes, sir.

(Testimony of Charles Roark, Trial Trans., Vol. III, pp. 47-49)

He admitted that at the time that he received the letter that he did not know if Tahlib existed or was the author, (Testimony of C. Roark, Trial Trans., Vol. III, pp. 69-70) and that he did not know if Cathy Ziglar, the alleged sister, existed or if there had been an affair. (Testimony of C. Roark, Trial Trans., Vol. III, pg. 70) He admitted that neither he nor anyone at Media Six tried to find out. Finally, he admitted that he published the letter to

"create a controversy." (Testimony of C. Roark, Trial Trans., Vol. III, pp. 52-53)

Roark further admitted that he did not attempt to determine if there actually was a person named Cathy Ziglar. He claimed that he could not contact inmates at the jail, but admitted that inmates could call him and that Tahlib had never done so. (Testimony of C. Roark, Trial Trans., Vol. III, pg. 44) Likewise, although Tahlib claimed to be charged with capital murder, thus implying that Ziglar was attempting to carry out a judicial lynching, Roark did not attempt to determine the nature of the charge, although it was a public record. (Testimony of C. Roark, Trial Trans., Vol. III, pg. 71) At trial, he was still congratulating himself on having "saved" Tahlib's life.

Both parties presented expert witnesses on the factual nature of the accusations, as constituting crimes. Two of those witnesses, Corbett and Johnson testified for Ziglar. One, Smith, testified for Roark. Corbett and Johnson stated that the charges were false. (Testimony of A. Johnson, Trial Trans., Vol. I, pp. 149-150); (Testimony of C. Corbett, Trial Trans., Vol. I, pp. 99-100) Smith stated that he would put little credence in them. (Testimony of R. Smith, Trial Trans., Vol. II, pp. 196-197) All three stated unequivocally that Tahlib was not a reliable source and had no credibility. (Testimony of C. Corbett, Trial Trans., Vol. I, pp. 124-125; Testimony of A. Johnson, Trial Trans., Vol. I, pp. 159-162; Testimony of R. Smith, Trial Trans., Vol. II, pp. 202-203) In particular, Johnson, stated that he was Ziglar's assistant at the time and that he, not Ziglar had the primary responsibility for prosecuting Tahlib. (Testimony of Andrew Johnson, Trial Trans., Vol. I, pp. 152-153) Roark himself claimed that Tahlib was credible

because he had boasted of his status as a drug dealer, although no other witness held this opinion.

As a result of the accusations, Ziglar removed herself from the prosecution and a special prosecutor, Corbett, was appointed. Because Ramsey and other witnesses lacked credibility, he ultimately chose to prosecute Tahlib on only one charge and convicted him.

At trial, Ziglar presented an expert witness, Dr. Edward Wasserman on the editorial process. Dr. Wasserman testified about the steps that an editor would take in determining which letters to the editor will be published and how accusations of this magnitude against a public official would be handled by a newspaper.

Dr. Wasserman testified that the nature of the charges was of such gravity and magnitude that, if they could be supported, they would not be relegated to the letters page. The great public concern for such a matter would dictate that the charges would be front page news. (Testimony of E. Wasserman, Trial Trans., Vol. I, pp. 180-182) Dr. Wasserman also testified that from the point of view of an editor, a person already convicted of a felony and in jail awaiting trial on other charges was inherently suspect as a source when accusing the person prosecuting his case of criminal acts. (Testimony of E. Wasserman, Trial Trans., Vol. I, pp. 186, 196-199).

Roark did not object to the designation of Dr. Wasserman as an expert before trial. He did not object to Dr. Wasserman's testimony at trial, except that it was on the "ultimate issue" (Trial Trans., Vol. I, pp. 187-188) In his post trial motion, he argued that Dr. Wasserman should not have testified but did not identify any basis for excluding his testimony. No constitutional issue was raised

concerning Dr. Wasserman's testimony at trial or at any time thereafter and the Virginia courts never passed upon the federal issue now raised in the Petition for Certiorari.

Following entry of judgment, Roark filed a Petition for Appeal to the Virginia Supreme Court. When that was denied, he filed a Motion for a Rehearing which was also denied. Roark did not, in either Petition or Motion, challenge the admissibility of Dr. Wasserman's testimony on any grounds, constitutional or evidentiary.

REASONS FOR DENYING THE PETITION

I. The Defendants Admitted That They Had No Evidence Upon Which To Base Their Professed Belief That The Accusations In The Letter Were True. Consequently, Publishing Such An Attack Without Any Investigation Was Reckless Disregard For The Truth Or Falsity Of The Accusation Of Suborning Perjury.

Roark argues that this Court should grant certiorari but effectively would have it do so in a vacuum. This Court has repeatedly said that the extent of First Amendment protection to be extended to a publication where the subject is a public official or public figure will be established on a case by case basis. It has furthermore held that an appellate court must conduct a *de novo* review of the entire record. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

Roark attempts to present this case as one in which the claim, verdict and judgment were based solely upon his failure to "thoroughly" investigate to determine the validity of the accusations of criminal conduct or the facts

upon which they were based. That is not the case and was not the evidence.

Roark makes no reference to the evidence presented at trial. He claims that he believed the accusations were true. But he fails to provide this Court any basis for such a belief. Roark's claims fly in the face of the evidence presented and his own admissions. He and Wallace, his employee, admitted at trial that at the time of publication, they did not know of any facts or evidence upon which to base a belief that the accusations were true.

Effectively, what Roark argues is that he has an unconditional right to publish accusations of criminal acts against an official, from any source, known or unknown, with no facts or evidence upon which to base a belief that the accusations are true, so long as he does so in the form of a "letter to the editor." To allow him anything less, he claims, would chill 1st Amendment rights for all the media. This Court has rejected such unlimited license in past decisions, beginning with. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

This Court has repeatedly noted that lies are not entitled to 1st Amendment protection. *E.g., Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974). Roark's arguments not withstanding, it is clear that he published lies. Two witnesses with personal knowledge of the case, Corbett and Johnson, testified that the accusations were false. One, Johnson, testified that he had primary responsibility for Tahlib's case. He stated that he was personally present, with counsel for Ramsey, when he made the statements implicating Tahlib.

Roark and Wallace admitted at trial that they had no reason to believe the lies were true. Roark was not commenting on a matter of public interest or concern. He published an accusation by a felon who was attempting to derail his prosecution and he published it verbatim. In doing so, he was simply pursuing his admitted goal of creating controversy by whatever means were available to sell his product. This stands in stark contrast to the other cases decided by this Court.

In *New York Times Co. v. Sullivan, supra*, 260-261, the advertisement at issue involved matters which had received national attention and were of national concern, the suppression of black citizens and the denial of basic civil rights. The defendant newspaper was able to articulate a basis upon which it could believe that the contents of the advertisement were true. The agency that placed the ad provided a letter certifying that the persons allegedly signing it had given their permission to use their names. The author of the letter was known to the paper to be a reliable person, as were several of the persons who were listed as endorsers.

In *St. Amant v. Thompson,* 390 U.S. 727 (1968), the defendant had personal knowledge of the person making the accusations. The matter in question involved the alleged involvement of a candidate for public office with corrupt union officials. The source for the information had provided a sworn affidavit attesting to the truth of his statements. Other persons involved in the union controversy had made similar statements concerning the activities.

In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the publication was based upon a government report which addressed a claim of police brutality and violation of civil rights which had received national attention. The story was about a report of the Civil Rights Commission. This Court described the report as one of "a number of possible interpretations of a document that bristled with ambiguities." *Id.* at pg. 290.

However, in *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989), this Court considered the publication of allegations of criminal conduct by a paper which bears some resemblance to this case. In that case, the Court stated that it was necessary to review the evidence when attempting to determine if the standard of *New York Times, supra* had been met. In *Connaughton*, this Court noted the evidence in the record from which a jury could find that the paper had reason to question the source's reliability and that it had deliberately avoided taking steps available to it to verify the accusations.

Ziglar submits that such evidence clearly exists in this case. In fact, this case is stronger than the facts in *Connaughton*.

In support of his argument, Roark has asserted that the fact that the accusations of the letter were false does not establish his awareness of falsity. In the abstract, this may be true. But Roark artfully avoids addressing the effect of his own admission, and Wallace's testimony, that they had nothing upon which to base a belief that the accusations were true and that they had no questions about Ziglar's honesty or ethics before Media Six published.

The fact that Roark finally admitted that at the time of publication he had no questions about Ziglar's honesty is an important point. The crux of a common law, criminal act is the *mens rea*, the evil intent. Honesty and *mens rea*, particularly in the setting of perjury, are mutually exclusive. If publication of accusations of the commission of crimes with no reason to believe in the existence of either criminal intent or criminal act is not reckless indifference to truth or falsity, then what is?

In additional support of his claim that he was justified in publishing the letter, Roark argues that prosecutors claim that felons testifying against felons are reliable. Therefore, he concludes, he should be permitted to assume that an attack by an admitted felon on a public official has enough facial credibility that he should be permitted to publish it even if he has no reason to believe it true and has made no effort to verify any of the alleged facts or accusations.

He makes the astonishing assertion that:

> . . . a convict, prior to trial has no motive to make false charges and, in fact every motive not lie, especially to the community at large. *Petition* at pg. 19

If this were true, then as Johnson testified, there would be little need for juries or criminal trials at all. (Testimony of A. Johnson, Trial Trans., Vol. I, pp. 160-161) The accused, having no motive to lie, would admit his guilt, express his remorse and the judge would then take the necessary actions to punish and reform the guilty person. However, the real world is not so neat and logical.

In this case, Corbett described the attempts by Tahlib to interfere with or prevent his prosecution by threats or other attempts to influence witnesses, including letters, as did Johnson. Smith, a witness called by Roark, made similar observations.

Notably, Tahlib was successful in preventing Ziglar and her assistants from continuing his prosecution by making the false accusations Roark published. This should be a matter of considerable concern. If Roark's arguments are accepted, then any person charged with a felony may disqualify the prosecutor simply by sending a "letter to the editor" accusing that prosecutor of crimes, which the "editor" or media outlet may publish with complete impunity.

Roark also asserts that the filing of a suit against him and his company for defamation in some way validates his supposed reliance on the believability of the letter. This is a circular argument that, if accepted, would prevent the filing of any suit for defamation, no matter how outrageous and false the accusations. Roark offers no authority for this assertion.

Ziglar submits that Roark and Media Six fail to offer any valid reason why the Petition should be granted. To hold that Roark and Media Six did not publish with reckless indifference, in the face of Roark's own testimony, is to effectively merge reckless indifference with actual knowledge of falsity. As Dr. Wasserman so succinctly put it, based upon what Roark admitted that he knew, the accusations constituted no more than "scribbling on the bathroom wall." (Testimony of E. Wasserman, Trial Trans., Vol. I, pg. 196)

II. The Issue Of Admissibility Of Expert Testimony As A Constitutional Matter Was Not Raised In State Court And Is Not Properly Before This Court. The Expert Testimony Provided Specialized Knowledge To The Jury And Was Admissible Under State And Federal Law.

For the first time, Roark presents the issue of the admissibility of testimony by Edward Wasserman as a matter of constitutional right. His only previous objection to admissibility was on the question of expert testimony on the "ultimate issue" (Trial Trans., Vol. I, pp. 187-188), an objection that has no basis in state, *Va. Code Ann.* § 8.01-401.3(B), or federal evidence law, *Fed.R.Evid.* Rule 704. *Fed.R.Evid.* Rule 702.

Wasserman was identified and his testimony summarized, as a matter of Virginia procedure, almost two months before trial. Defendants did not object to the designation. Their only trial objection is as described above.

Neither the Petition for Appeal nor the Petition for a Rehearing to the Virginia Supreme Court raised any issue of Dr. Wasserman's testimony on constitutional or other grounds. In fact, neither Petition even mentioned Dr. Wasserman or his testimony. Consequently, the issue presented to this Court was never raised or considered by any state court. Ziglar submits that on that ground alone certiorari on this issue should be refused, *cf., Orr v. Orr*, 440 U.S. 268 (1979).

But, even if this Court were to consider the issue, Roark fails to make a convincing case. He asserts that use of Dr. Wasserman's testimony is contrary to the jurisprudence of this Court. But, he fails to cite any decisions of this Court that would support that assertion.

Threshold admissibility of expert testimony in Virginia is governed by a similar standard to that in federal courts. The question is whether the witness has specialized knowledge that would assist a jury in understanding the evidence. *Compare Va. Code Ann.* § 8.01-401.3(A) *and Fed.R.Evid.* Rule 702. No objection was raised to Dr. Wasserman's qualification as an expert.

Ziglar submits that the editorial process, determining which stories or letters to present and the manner in which to do so, is specialized and not within the common knowledge of a juror. Dr. Wasserman was presented both on the issue of the credibility of an author such as Tahlib and issues such as how an editor, as opposed to a reporter, would have addressed the issue. Notably, Dr. Wasserman raised one of the same issues as the witness Smith, the need to identify the actual author of the letter, to see that it was not phony. (Testimony of E. Wasserman, Trial Trans., Vol. I, pg. 179) Dr. Wasserman was aware, before he testified, of admissions by Roark and Wallace that they had no facts or evidence upon which to base a belief that the allegations of the letter were true, and the admission by Roark that he had no reason to question her honesty.

Dr. Wasserman did not testify about negligence. The term was never used during his testimony. He did testify that Media Six and Roark were reckless.

Ziglar submits that both by reason of failure to make a timely objection and the actual nature of his testimony, that Dr. Wasserman's evidence is not grounds upon which to grant the Petition, and that it should not be considered if the Petition is granted.

III. The Accusations, Once Proven, Constituted Defamation *Per Se* For Which Damages Were Recoverable. Plaintiff And Her Witnesses Testified To The Effect Of The Accusations Upon Her. Defendants Did Not Produce Any Contrary Evidence.

The final argument made by Roark is that the damage award was improper and that it conflicted with Ziglar's theory of the case. Virginia law is clear that in cases of defamation *per se*, damages are recoverable without proof of financial loss. *Tronfeld v. Nationwide Mutual Ins. Co.*, 272 Va. 709, 636 S.E.2d 447 (2006). Accusations of criminal acts are defamation *per se* in Virginia. *Shupe v. Rose's Stores*, 213 Va. 374, 192 S.E.2d 766 (1972)

Ziglar testified, as did Johnson, as to her humiliation and embarrassment. Roark offered nothing in contradiction. The argument presented to this Court on the issue of damages is circular. If the charges are false then there is no injury, if the charges are true then there is still no injury.

Gertz, supra, does not stand for the proposition for which Defendants cite it. This Court did not hold that damages may only be recovered for actual injury. It did hold that if the proof of defamation does not meet the standard of *New York Times, supra*, that only actual damages may be recovered. Since the issue here is whether the *New York Times* standard has been met, the argument makes no difference. If Ziglar proved her case to the standards set by this Court, sufficient to sustain a jury verdict, then she is entitled to damages. If she did not meet that burden of proof, then the entire issue of damages is never reached.

In any event, the amount of damages awarded, $75,000, is not a large amount and does not evidence passion or prejudice on the part of the jury that heard the case. The issue certainly does not rise to the level of a constitutional issue under the decisions of this Court.

CONCLUSION

For the foregoing reasons, Ziglar submits that the Petition for Certiorari should be denied.

Respectfully submitted,

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